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MARTIN'S

PRACTICE OF CONVEYANCING;

WITH

Forms of Assurances.

BY

CHARLES DAVIDSON,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER AT LAW, AND
FELLOW OF CHRIST'S COLLEGE, CAMBRIDGE.

ECCLESIASTICAL
COMMISSIONERS
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ADVERTISEMENT.

Mr. Martin, who projected and commenced this work, died after having published the First Part (comprising the Introduction and the First Book) of this Volume, and the whole of the Second Volume, and without leaving any Materials for the subsequent Parts, or any indication of their intended Contents or Arrangement beyond that supplied by the short Prospectus which was printed as an Advertisement. The present Editor is responsible for the Second and Third Books of this Volume, and for the whole of the Third, Fourth, and Fifth Volumes.

It is right to mention, that it has been found impossible to enter at length into the various subjects intended to have been treated of in the Second Part of this Volume without increasing the bulk of the work beyond all reasonable limits. After much con-

sideration, it clearly appeared that there was no useful alternative between a series of complete Treatises, which would have required several Volumes, and that, which has been adopted, of a few practical Remarks on the different parts and kinds of Assurances, with references to the Text Books treating of the various subjects.

An Appendix, containing several additional Precedents, has been subjoined, which, it is believed, will be found extremely useful.

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PRACTICE OF CONVEYANCING.

INTRODUCTION.

SECTION 1.

Conveyancing characterised and defined.

SECTION 1.

Conveyancing characterised.

I. THE System of Conveyancing established in this country is of a very mixed character; deeply marked with the traces of its feudal origin, but exonerated from most of the restrictions of that singular polity whose harsher features have yielded to the liberal influence of commerce, of more polished manners, and the increased intelligence of the people. Still it is a very abstruse and complicated system; many of its doctrines are extremely refined, nor is its practice less subtle; owing, probably, in a great degree, to those dialectical habits which the old lawyers acquired by being bred up in the then philosophy of the schools—a sort of verbal logic, better fitted for giving acuteness to the mind than for informing it with enlarged views of human affairs.

Definition of Conveyancing.

II. In its more precise and technical sense, Conveyancing may be considered as the science, and also as

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the art, of alienation. If, by an investigation of the laws of property, we elicit and systematise the principles which govern its disposition, we are then compacting the science. The science of alienation, therefore, may be defined—a systematic statement of the principles of alienation. To apply these principles to practice, by means of appropriate instruments or conveyances, constitutes the art of alienation.

Plan of the present Essay.

III. Entertaining this view of the subject, I propose in the present Essay to treat of it strictly as a *scientific art* (*a*). Writing, however, principally for the student and young practitioner, and aiming at as much conciseness as is consistent with perspicuity and the nature of a didactic work, there are many topics very suitable for discussion in a more comprehensive treatise, which, in a work, like the present, intended only as an INTRODUCTION TO CONVEYANCING, must be passed over without notice, or only glanced at. After some preliminary observations on the character of the study, and the method in which it should be conducted, I shall, in the First Book, treat of "ABSTRACTS OF TITLE." Every Abstract of Title is, or ought to be, *an epitome of the evidences of ownership;* and as, in this country, all landed property is held by *title* (*b*), and not like

Abstract of Title defined.

(*a*) "Art is the application of knowledge to a practical end. If the knowledge be merely accumulated experience, the art is *empirical;* but if it be experience reasoned upon and brought under general principles, it assumes a higher character, and becomes a *scientific art.*"—Herschel's Nat. Phil., art. 64, p. 70.

(*b*) The following definition of the term "title," though not ex-

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personal chattels, by possession only, no one can purchase such property, or advance his money upon its security, with a certainty of obtaining that which is bought or mortgaged, unless it is first made manifest by the evidences of ownership that the alleged owner has, in fact, a good title to the estate in question. Hence has arisen one of the most responsible, and certainly not the least arduous, duties of the conveyancing counsel, viz. that of advising on Abstracts of Title.

Analysis of Assurances.

IV. Having, then, in the first place, examined the subject of Abstracts of Title, without a due consideration of which the rights of property can in no wise be regulated with certainty, or safely made the subject of disposition, I shall next proceed, in the Second Book, to treat of "MATTERS COMMON TO ASSURANCES." In every Assurance (as I have elsewhere observed) (*a*), *i. e.* in every instrument by means of which any interest or estate is created or simply conveyed, there must necessarily be an alienor and

pressed with much precision, is sufficiently accurate for all practical purposes:—"A title in this country does not mean merely those documents which *directly* confer right upon the existing possessor, as, for instance, the deeds of lease and release by which an estate is conveyed to you, but it means the abstract result of the whole series, or succession of instruments and events by which the possessor for the time being could, according to the existing law of this country, be in any way affected, either as raising questions of dormant right in others, which might still be rendered available, or as creating incumbrances with which he is or may be charged." Park, on Registration, p. 36.

Title defined.

(*a*) Recital-Book, Introd. § 1, art. 1 and 2.

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alienee, as well as a subject-matter of alienation. The former are denominated *parties;* the latter, *parcels.* It is likewise plain that every act of alienation must originate from some motive. One parts with his estate for a sum of money; another, in consequence of the affection which he has for the alienee; and a third, in satisfaction of some debt: but whatever be the inducement, it is termed the *consideration.* Some expressions must be employed for the purpose of evincing an intention to alien; and these are to be found in what are technically called the *operative words.* In order to develope the characters and interests of the parties, or to preserve the continuity of title, or to put upon the instrument the evidences of its own validity, some explanatory statements are commonly premised; and these are called *recitals.* It is also necessary to declare what interest the alienee is to take in the parcels; and this is usually done by a clause denominated the *habendum.* Besides, the numerous and complicated transactions of mankind have originated the necessity of inserting various kinds of *covenants;* and, to prevent the intervention of fraud, the law has prescribed certain essential formalities, as, for instance, that a deed shall be *executed, i. e.* sealed and delivered.

Constituents of Assurances.

V. Such are the constituents of most Assurances; without an accurate knowledge of which it would be as idle to attempt to draw a conveyance, as to construct a watch when ignorant of the nature and use

of the barrel, the verge, the pinions, the centre, contrate, and balance wheels, &c. We might call the thing which we had fashioned a watch; but the probability is that it would give either an incorrect notation of time, or none at all (*a*). Having, therefore, expounded these matters, I shall, in the Third Book, treat of "PARTICULAR SORTS OF ASSURANCES," comprehending in this division the various subjects of purchases, mortgages, leases, partitions, exchanges, settlements, wills, and auxiliary instruments; and, in the Fourth Book, a practical exposition of the law relating to "STAMPS ON ASSURANCES" will be attempted.

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Particular sorts of Assurances.

Stamps on Assurances.

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Study of Conveyancing.

VI. With respect to the Study of Conveyancing, on which I shall now offer some general observations, it follows, from the definition already given (Art. II.) that, in order to its successful prosecution, two things are indispensable: 1, A correct ascertainment of its principles; and, 2, Skilfulness in practically applying them. Now nothing is more commonly laid down in treatises on the conduct of law studies than this proposition; and yet, judging from its limited influence in practice, one can hardly suppose that, by the majority of students, it has been fully under-

Study of Conveyancing.

(*a*) Recital-Book, Introd. § 1, art. 2.

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stood. They have given it, perhaps, a mere unthinking acquiescence, never inquiring as to the particular nature of the procedure in either case; but at once engaging in the study of some text book, supposed to contain an authentic exposition of the law. The very commonness of the precept and its generally acknowledged truth, are circumstances each of which is calculated to produce an uninquiring assent; although the whole value of it, practically, depends on our having a clear insight into the character of the study and the method in which it should be pursued. It is an opinion very generally entertained (and one more pernicious could hardly have taken root), that a correct and comprehensive knowledge of principles can be best acquired from the study of dogmatical or elementary treatises; and accordingly such works have superseded, in many instances, all inductive inquiry into the original sources of our law. The student may rest assured that a procedure of this sort, in which the mind is a mere passive recipient, can only serve to make what Lord Bacon significantly calls "lawyers in haste;" who, for the most part, may be truly likened to those blades of corn that grow yellow before the harvest, but have empty ears (*a*). Whoever would acquire a thorough *knowledge* of principles, in the proper sense of the word (*b*), must not be content to take them upon

(*a*) Quint. lib. i. cap. iii., who applies this forcible image to those precocious children whose early ripeness is too often a fatal omen of premature decay.

(*b*) I say "proper sense of the word," for no term is oftener misapplied. Hobbes, with his

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trust, but ought, agreeably to the great fundamental precept of inductive philosophy, to *familiarise himself with the particulars of which such principles are, in fact, the abstract result and expression.* "To keep close to particulars" being then a rule of procedure applicable not only to the present subject, but to all sciences not merely speculative—What, it may be asked, are the "particulars" to be attended to in the study of Conveyancing? (*a*) Satisfactorily to answer this question, some account of the Theory of Common Law must of necessity be given; for from that source our System of Conveyancing has originated, and is principally sustained (*b*).

Theory of Common Law.

VII. The Common Law is not so much the contrivance or result of any human wisdom, acting upon

usual discrimination, thus defines it:—"There are two things necessarily implied in this word *knowledge;* the one is *truth*, the other *evidence:* for what is not truth can never be known. For, let a man say he knoweth a thing never so well, if the same shall afterwards appear false, he is driven to confession that it was not knowledge, but opinion. Likewise, if the truth be not evident, though a man holdeth it, yet is his knowledge thereof no more than theirs who hold the contrary; for, if truth were enough to make it knowledge, all truth were known, which is not so."—Human Nature, ch. vi. art. 2, p. 33. Dr. Whately, who probably had this passage in mind, has given nearly the same analysis, adding, however, another element, *viz.* conviction.—See Logic, p. 281, *note*, and Essays, p. 8.

(*a*) "In all sciences," says Bacon, "they are the soundest that keep close to particulars."—Works, v. 346.

(*b*) The reader will find ample evidence of this if he consults St. Germyn's Doct. & Stu. dial. 1, cap. 7,—an admirable little treatise, as concise and luminous as the more celebrated one of Littleton.

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an enlarged experience, as the production of time, the growth of circumstances, the offspring of the various necessities which the manners, the religion, and the commerce of the people have at different times imposed (*a*). Antecedently to all law (at least all *positive* law, strictly so called), men are governed by certain usages or customs, not created, but spontaneously springing up, and which bind the people, not by virtue of any express sanction of the supreme power, but by the force and authority of public opinion, which is to them a rule of positive morality. But as society advances, as legal relations increase and multiply, and men's minds are opened and liberalised by ingenuous science, those usages or customs, or, as Lord Bacon calls them, "laws written in living tables," which grew up with the growth of society, are gradually transmuted, by means of judicial decisions, into legal rules, clothed with all the authority of positive law (*b*). By the exercise of this important and *constitutional* function of the Judges, acting as ministers of the state or supreme power, much of what is commonly called *jus non scriptum* (an expression borrowed from the Roman

(*a*) See Burke, x. 555.

(*b*) See Notes and Illustrations (A.) "Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly when the customs are promulged in its statutes; established by the state circuitously, when the customs are adopted by its tribunals."—Austin, Province of Jurisprudence Determined, p. 28; and see Hobbes's Leviathan, P. 2, c. xxvi. p. 143.

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jurists) has, in fact, become written law, embodied and expressed in the records of our tribunals, and published in the reports. Originally, however, judicial decisions rested solely on the oral testimony of the suitors or witan, who bore evidence to the judgments which they or their predecessors had pronounced (*a*). They remembered and "recorded" them. In progress of time, and, as the use of letters became more common, that which had formerly been confided only to living testimony was, for greater certainty, committed to writing, and thus perpetuated as a "record of court" (*b*). To give to adjudged cases greater publicity, they were at length put forth in certain periodical publications called "Reports," of which a regular series, in print, from the reign of Edward the Third inclusive, is still extant (*c*).

Origin of Reports.

(*a*) Palgrave, English Commonwealth, P. 1, c. iv. p. 145.

(*b*) "It is called a record," says Lord Coke, "for that it recordeth or beareth witness of the truth."—3 Inst. 71; and see Lambard's Eirenarchia, b. 1, c. 13. At one time it was usual to set down in the record the reason and causes of judgment; but, owing to the multiplicity of business, this practice was discontinued. "In truth," says Coke, "if judges should set down the reasons and causes of their judgment within every record, that immense labour should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *elephantini libri*, of infinite length." Lord Coke forgets that the Romans did not use the expression "*libri elephantini*," with reference to the *size* of their books, but because they were composed of leaves of *ivory*.

"Record."

(*c*) 4 Inst. 5. "English jurisprudence," says Burke, "has not any other sure foundation, nor consequently the lives and properties of the subject any sure hold, but in the maxims,

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Adherence to precedents.

VIII. The practice here adverted to, of recording and reporting judicial decisions, has arisen from the circumstance, that, in our system of judicature, the judges are bound by *Precedents;* bound to decide by, what Lord Coke calls, "the *Golden Metwand of the Law,* and not by the crooked cord of discretion." Indeed, if it were otherwise, there could be no *certainty* in jurisprudence; men would have no knowledge of their duty, no assurance of their rights, and the stability of all property would be shaken. "Optima est lex, quæ minimum relinquit arbitrio judicis; optimus judex, qui minimum sibi" (*a*). But, if the law were decided upon precedents only, however rigidly they might be adhered to, it could have no claim to the character of a science; and, from the rapid accumulation of cases and artificial rules, consequent on those new combinations of circumstances, which, while society advances, continually take place, would soon sink under its own weight. Our common law system, however, is pervaded with and upheld by *Principles,* which give to it coherency and a consistent form; and, generally

rules, and principles, and juridical traditionary line of decisions contained in the notes taken, and from time to time published (mostly under the sanction of the judges), called Reports."—Burke, xiv. 332.

(*a*) De Dig. et Aug. Scient. lib. viii., aph. 46; et vid. aph. viii. "If a judge," says Bacon, in another place, "hath power to rule by private direction, for which there is no law, how can he be questioned by a law, if in his private censure he offends?" —vi. 106. See also the observations of Lord Tenterden (3 Barn. & Ad. 17), and Mr. Justice Ashurst (7 Durn. & East, 419).

speaking, every adjudged case may be considered as the embodied expression of its own appropriate principle. "Precedents," said Lord Mansfield, "serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law enacted by statute, depends upon principles; and these principles run through all the cases, according as the particular circumstances of each have been found to fall within the one or other of them" (*a*). "Our common law system," observes another learned judge, Mr. Justice Park, "consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and, for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient (*b*), to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me," he adds, "to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science" (*c*).

(*a*) Cowp. 39.

(*b*) "Nihil quod est inconveniens est licitum," is a maxim often used by our old law writers, particularly Littleton and Lord Coke; but it must be applied with great caution and considerable qualification. See the observations of Lord Eldon, 2 Bos. & P. 109.

(*c*) 8 Bing. 515.

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Principles to be studied in their concrete.

IX. The principles of the Common Law (*a*) being, then, according to the foregoing theory, embodied and expressed, for the most part, in adjudged cases, it is very obvious that, in order to acquire a thorough knowledge of those principles, the student must habitually refer to judicial decisions; that the one being, as it were, the *language* of the other, he must first *learn* to *read* that language before he can know what is expressed by it. Instead, however, of thus "keeping close to particulars," the very opposite procedure is frequently adopted; and accordingly it happens, as might have been anticipated, that he who learns principles by rote only, is, when called upon practically to apply them, continually at fault, like one who attempts to express himself in a language which he but knows imperfectly. It is not intended by these observations to recommend anything so unreasonable as the disuse altogether of dogmatical or elementary treatises, but only that they should not be *exclusively* studied; and that an habitual regard should be paid to the original authorities. In adopting the course here suggested, whether with the view of eliciting some general principle, or of verifying one already obtained, or of applying any precedent in practice, it is important to bear in mind that all judicial decisions are not of equal authority, and that, to form a just estimate

(*a*) "Generally and properly so called, because it is most general and common to all cases and causes, both civil and criminal."—Bacon, vi. 421; and see Sir John Davys's Preface to his Reports.

of their value in this respect, various circumstances must be taken into consideration. What these circumstances are, I shall now endeavour briefly to point out.

Authority of adjudged cases.

Authenticity of Reports.

Criteria of authenticity.

X. And, first, it is to be observed, that, before relying upon any judicial decision, the student ought to satisfy himself that the report of it is *authentic*, *i. e.* contains a correct statement of facts as they really happened (*a*). If it be a *genuine* one, *i. e.* made by the person whose name it bears, there is then a strong presumption in favour of its authenticity; particularly if the author had peculiar means of acquainting himself with the facts, and was of known honesty, accuracy, and erudition. And this inference becomes still more close and cogent where the report was published soon after the adjudication, when the circumstances were fresh in recollection; for then the errors, (if any), whether designed or accidental, would have been at once detected and exposed. Apart, however, from all personal testimony, the *intrinsic* evidence which the report itself affords will often be decisive of the question, either of genuineness or authenticity; though it must be admitted (as is remarked in the Horæ Paulinæ) that this species of proof cannot always be drawn out in words, or conveyed to the apprehension of the reader in any other way, than by sending him to the work

(*a*) See Dr. Watson's Apology for the Bible, where the distinction between "authenticity" and "genuineness" is pointed out, and very happily illustrated.

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itself (*a*). Sometimes there exist contemporary reports of the same case, and when they coincide in all essential particulars, the authenticity is undeniable; for, where there has been no previous concert, it is morally impossible that the concurrence of two or more persons in the same statement should spring from chance: it can arise only from the reality of the facts. And the force of this conclusion will not be at all diminished though the several accounts are anonymous, or even if each of the reporters shall be considered as wholly unworthy of credit; for it is grounded, (as Dr. Campbell remarks), not on the testimonies themselves, but on their *concurrence* (*b*). It is hardly necessary to add, that, although a report exists only in manuscript, yet, if its authenticity has been fully established, this circumstance will not of itself in any way weaken the authority of the case as a judicial precedent (*c*).

Character of Court to be considered.

XI. Regard should also be had to the *Court* in which any decision is pronounced. Thus, it is a

(*a*) Paley, iii. 265. The Horæ Paulinæ (which is the most original, if not the best, of Paley's admirable works), is perhaps the finest specimen of reasoning from *intrinsic* evidence, which English literature affords. Mr. Hallam's remarks on the posthumous portions of Hooker's Polity, and on the Icon of Gauden, (ascribed to King Charles I.), may also be referred to. Const. Hist. i. 299, ii. 314, third edition. See also Taylor's History of the Transmission of Ancient Books, chap. iv.

(*b*) Philosophy of Rhet. B. i. ch. v. Vol. i. 129.

(*c*) The fact, however, of a report being in manuscript only, (and consequently not generally known), will, in some cases, influence the mind of the judge in awarding costs. See *Corder* v. *Morgan*, 18 Ves. 344.

general rule that Nisi Prius decisions, however eminent the judge may be by whom they were delivered, are entitled to very little consideration, unless they have been acted upon by succeeding judges sitting in banco, or recognised as authority by the other tribunals (*a*). "It is utterly impossible," said Chief Justice Mansfield, "for any judge to decide at once rightly upon every point which comes before him at Nisi Prius" (*b*). Accordingly, if a decision at Nisi Prius is opposed to one in any of the other superior courts, the latter must, in general, be followed. Where courts are co-ordinate in jurisdiction, such as the Vice-Chancellor's and the Rolls, and their decisions on any particular subject happen to be con-

(*a*) Ram's Legal Judgment, p. 167. "Notwithstanding the great respect which I feel for every decision by Lord Ellenborough, I cannot forbear observing that the case of *B.* v. *P.* was only a Nisi Prius decision, and the termination of the suit was such (a juror being withdrawn) as to give no opportunity of revising the opinion there expressed."—Abbott, C. J., 3 Barn. & Cr. 143. "No one will suspect me of not giving all due weight to any opinion of Lord Kenyon; but I must know a great deal more than I do before that determination at Nisi Prius will decide my judgment upon such a point."—Eldon, C., 15 Ves. 262. "As to the Nisi Prius case at Lancaster, I wish such cases were never cited. It is not right to repeat opinions hastily formed, and delivered in the hurry of trial; and the practice of referring to them has occasioned all the confusion that the enemies of our laws object to."—Best, C. J., 2 Bing. 90. For these and some other quotations relative to the subject discussed in the text, I am indebted to the researches of Mr. Ram, who, in his Treatise on Legal Judgment, has collected from the law reports much valuable information respecting our judicial system.

(*b*) 5 Taunt. 195.

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flicting, we must, until the question has been finally settled by higher authority, adopt that which, after contrasting the arguments in favour of each, appears most consonant to judicial precedents and principles. So, if a decision has been reversed by any court of error, we are bound to consider the original judgment as annulled by the authority of that court, and to treat it as being wrong in point of law, until the highest tribunal shall have pronounced a different opinion, or unless the judgment of reversal should appear, beyond all reasonable doubt, to have proceeded on wrong principles. "If we do not adopt this course," says Mr. Baron Parke, "no decision, except that of the House of Lords, can be safely relied upon as an authority by practitioners in advising their clients, or judges in pronouncing an opinion upon questions of law" (*a*). With respect to the judgments of the supreme court of judicature, the House of Lords, they exceed in authority all other decisions, although there may be found a more recent case decided differently in any of the courts below (*b*). "A rule of law," observes

(*a*) 2 Cr. & Mee. 64.

(*b*) 7 Ves. 347; 6 Sim. 397. For an interesting historical account of the judicial powers of the lords, see Mr. Hallam's Const. Hist. iii. 23—37. "In cases of appeal or of error (which is in the nature of an appeal) the court of appeal is obliged to judge, not by its *own* rules, acting in another capacity, or by those which it shall choose *pro re nata* to make, but by the rules of the inferior court from whence the appeal comes; for the fault or the mistake of the inferior judge is, that he has not proceeded as he ought to do, according to the law which he was to administer; and the correction, if such shall take

Lord Eldon, "laid down by the House of Lords cannot be reversed by the Chancellor, [and his Lordship's remark is equally applicable to the other judges]; though, if there is any difference from a circumstance that was not before the court, the cause may be decided upon that" (*a*). It has, indeed, been said of some particular cases determined by the House of Lords, that they are to be obeyed, not followed; but this unconstitutional doctrine has been strongly condemned (*b*). SECTION 2.

Before dismissing this subject, it may be worth while to add, that, although the courts of law and equity possess distinct jurisdictions, and act, in a great measure, upon different principles; yet, so far forth as equitable decisions are founded upon legal grounds, they are followed in courts of law; and, in like manner, decisions at law are adopted in equity. The

Consultory responses.

place, is to compel the court from whence the appeal comes, to act as originally it ought to have acted according to law, as the law ought to have been understood and practised in that tribunal." Report of Committee to inspect Lords' Journals, Burke, xiv. 434; and see *Ffytche* v. *Bishop of London*, 2 Bro. P. C. 211. Dr. Watson, in delivering his opinion on this case, ventured to call in question the utility and even justice of the old maxims, *stare decisis, stare super antiquas vias*. See his Life, i. 190.

(*a*) 6 Ves. 547; Bla. Com. iii. 57.

(*b*) "Although every court may say, that, if a case varies in facts and circumstances, it is at liberty to proceed upon those different circumstances, I do not recollect," said Lord Eldon, "that it ever fell from a judge, in this country, that he would obey the judgment of the House of Lords in the particular case, but not follow it in others. That is not a doctrine to which we are accustomed."—6 Dow, 112.

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courts of equity, too, when desirous of informing themselves on any doubtful legal question, are in the habit of directing a case for the opinion of one of the courts of law—not that such an opinion, when certified, is to be accepted as a decision, and implicitly followed, but only as affording assistance to the court in forming its own judgment. It is, in fact, a mere "consultory response (*a*)."

Antinomies, or cases of contradiction.

XII. Again, it is to be observed, that, besides the difference which may exist between the decisions of

(*a*) See Notes and Illustrations (B). "It is quite clear," said Lord Eldon, "that the equity judge in these cases may differ from the judges of the courts of law, and may decide in opposition to the opinions stated by the common law judges in their certificate. Lord Thurlow once sent a case for the opinion of the Court of King's Bench, and, not being quite satisfied with that opinion when given, he sent to the court again for a better answer. Lord Kenyon was not very well pleased at this proceeding of his friend, Lord Thurlow, but the utility of it was manifested by the result; for the court gave an unanimous opinion in contradiction to its former judgment. I myself, on one occasion, [*Wykham* v. *Wykham*, 18 Ves. 395] sent a case for the opinion of the Court of King's Bench, on the question as to what estate a party took in certain premises, and the court unanimously certified that the party took an estate of freehold. Not being quite satisfied with that opinion, I took the liberty to send the same question for the opinion of the judges of the Common Pleas, and they unanimously certified that the party took no estate at all. I was impertinent enough to think they were both in the wrong, and decided on my own view of the case; and with that decision the parties were satisfied, and no more was heard of the case."—1 Dow & Cl. 296. Lord Thurlow appears to have thought that the certified opinion of the Judges was binding on the Chancellor, whatever his own view might be. See 3 Ves. 298.

one court and those of another, it sometimes happens that there is a discrepancy between the judgments of the same court, and even of the same judges. When this is the case, it is most safe, as a general rule, to adopt the more recent decision (*a*). Still it must be borne in mind, that if the suit was an amicable one, or "passed without challenge of the party," (as Lord Coke expresses it) (*b*), or was compromised, or appealed from and no final judgment given (*c*), or was decided on its own special circumstances (*d*), or by a single judge in opposition to a former decision by a full court (*e*), or if the judges were equally divided in opinion, in which last case there is no decision, properly so called—under any of these circumstances, a precedent is divested of much of its authority, and must, on all occasions, be used with caution and distrust: While, on the other hand, when a decision has been pronounced, after much argument, or by an unanimous court, or has long been recognised and acted upon ("exempla enim, sicut aquæ, in profluente sanissima")(*f*)—these are circumstances which greatly augment its authority as a judicial precedent.

(*a*) See De Aug. Scient. lib. viii. aph. 23, 24. So, when two acts of parliament, which passed during the same session, and were to come into operation the same day, are repugnant to each other, that which *last* received the royal assent must prevail, and be considered *pro tanto* a repeal of the other. *Rex* v. *The Justices of Middlesex*, 2 Barn. & Ad. 818.

(*b*) 4 Co. Rep. 94.

(*c*) 1 Turn. & Russ. 230.

(*d*) See Ram on Legal Judgment, ch. xvi. p. 140.

(*e*) 3 Dowl. P. C. 61.

(*f*) De Aug. Scient. lib. viii. aph. 28.

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Authority of dicta.

XIII. In the absence of decisions, reliance is often placed on what are called "dicta," which are of two kinds, being opinions either not necessary to the judgment given of record, and then called "obiter dicta," or else necessary and concluding to the judgment, and then termed "judicial dicta." These last are of much greater authority than the former, because delivered upon deliberation, under the sanction of the judge's oath (*a*). All dicta ought to be read with reference to the case then before the court (*b*). "General words," said Lord Tenterden, "whether uttered by a judge in court, or spoken elsewhere, or published in a treatise, must, on sound principles of logic and criticism, be limited to the subject-matter on which they are employed: the attempt to carry them further only leads to error" (*c*). In considering what weight any particular dicta are entitled to, it is material to inquire whether they were uttered by a judge of eminence,

General words must be limited to the subject-matter in question.

(*a*) "An extra-judicial opinion," said Chief Justice Vaughan, "given in or out of court, is no more than the prolatum or saying of him who gives it, nor can be taken for his opinion, unless every thing spoken at pleasure must pass as the speaker's opinion. An opinion given in court, if not necessary to the judgment given of record, but that it might have been as well given if no such or a contrary opinion had been broached, is no judicial opinion, nor more than a *gratis dictum*. But an opinion, though erroneous, concluding to the judgment, is a judicial opinion, because delivered under the sanction of the judge's oath, upon deliberation, which assures it is, or was when delivered, the opinion of the deliverer." — Vaugh. 382; and see 2 Cr. & Mee. 117.

(*b*) 9 Bing. 168.

(*c*) 2 Barn. & Ad. 124.

and whether the same or any other judge ever expressed an opinion tending a contrary way (*a*). If a dictum has long been recognised, and is not opposed to any decision, it then becomes a judicial authority of considerable weight (*b*).

XIV. Such, then, are some of the principal circumstances by which we should be guided in estimating the *authority* of adjudged cases. No matter what object we have in view, whether it be to deduce some general principle, or to verify one already deduced, or to reason only from one case to another, we shall, without a proper attention to these *criteria*, be perpetually led astray. The mere logical process, indeed, may be rightly conducted; and yet if the decisions, which form the *data* from whence we reason, are not such as will be uniformly followed under similar or analogous circumstances, they can yield no useful inference. If our premises are false or doubtful, the conclusion drawn from them must be equally so.

Importance of distinguishing in each case conditional from accidental circumstances.

XV. The main obstacle, however, to our progress in the present study, arises from the difficulty of distinguishing in each case what circumstances are *conditional* to the judgment given from what are merely *accidental;* and hence that "competition of opposite analogies" which Paley justly considers as one principal source of disputation, and into which,

(*a*) 3 Russ. 77. (*b*) 19 Ves. 487.

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indeed, as he observes, the greater part of legal controversies may be resolved. "When a point of law," says he, "has been once adjudged, neither that question, nor any which completely, and, in all its circumstances, corresponds with *that*, can be brought a second time into dispute: but questions arise which resemble this only indirectly and in part, in certain views and circumstances, and which seem to bear an equal or a greater affinity to other adjudged cases; questions which can be brought within any fixed rule only by analogy, and which hold a relation by analogy to different rules." In conducting, therefore, any argument from example, under which term may be comprehended induction, analogy, precedent, &c., it is important to consider attentively in each case, "not what differences or resemblances are *intrinsically* the greatest, but what are those that do, or that do not affect the argument (*a*)." Circumstances

(*a*) Whately, Rhet. pp. 76—84; Logic, p. 232; and see Dugald Stewart's Philosophy, ii. 347, third edition, where there are some valuable observations on this subject, though more immediately applicable to physical investigations. "The work of a judge," says Hobbes, "is very difficult, and requires a man that hath a faculty of well distinguishing of dissimilitudes of such cases as common judgments think to be the same. A small circumstance," he justly adds, "may make a great alteration, which a man that cannot well discern, ought not to take upon him the office of a judge." Dial. of the Common Laws of England, p. 110. It is a shallow remark of this admirable writer and acute thinker, (where his judgment was not blinded by his political prejudices), that, "if judges were to follow one another's judgments in precedent cases, all the justice in this world would at length depend upon the sentence of a few learned, or unlearned, ignorant

apparently trivial (and on that very account more liable to be overlooked) will often destroy the analogy, and thus render the case inapplicable; and, on the other hand, it will in many instances be easy to point out some difference or resemblance intrinsically important, though in relation to the argument of no real weight. Suppose, *e. g.* the question to be—"Whether a prohibition against anticipation annexed to a provision bequeathed to a woman for her separate use, notwithstanding any coverture, and she being at the time, and still continuing *unmarried*—whether that prohibition so modifies the nature of the property bequeathed, as to render the interest which she takes incapable of being aliened (*a*)?" Now, it is a well known rule of law, that an inalienable estate cannot be created, unless by annexing to the gift a forfeiture or defeazance on the happening of a particular event, or on a particular act being done: in that case the donee takes by the limitation a certain estate, of which the event or act is the measure; and upon the happening of the event, or

men, and have nothing at all to do with the study of reason." In another work he finds fault with the lawyers for using so "barbarous" a term as *precedent*, suggesting *example* as a more appropriate expression. Leviathan, P. I. ch. ii. p. 50. Aubrey advised Hobbes to apply himself to the study of the laws, and, with this view, gave him a copy of Lord Bacon's Elements; but he answered that he was not likely to have life enough to go through with such a long and difficult task. He composed, however, a treatise "De Legibus," but seems not to have ever published it. Aubrey, ii. 613; Athen. Oxon. iii. 1206, Dr. Bliss's edit.

(*a*) *Woodmeston* v. *Walker*, 2 Russ. & Myl. 204.

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the doing of the act, a new and distinct estate accrues to a different individual. In the present case, there is no gift over; it is a naked prohibition, unguarded by any clause of forfeiture. It has been held, however, in equity, that where property is given to a *married woman*, to her sole and separate use, alienation may be prohibited in respect of the property so settled, without annexing any limitation over, to operate by way of defeazance of the first estate: hence it might be inferred, that in the case supposed the prohibition against anticipation would equally avail. But to this it may be objected, that a *feme sole* being *sui juris* at law, the power of the court is not required for her assistance or protection; whilst a *feme covert*, on the contrary, is under the control of her husband, and owes her ability to enjoy a separate estate, exclusive of marital rights, entirely to the doctrine of equity: and these circumstances, be it observed, constitute *the very ground* on which the precedent adduced was decided. The analogy, therefore, wholly fails.

Again, let the question be—whether an equitable mortgage of copyholds can be created by a deposit of copies of court rolls? Now it has been held, that a deposit of title-deeds will constitute a good equitable mortgage of freeholds: hence it may be inferred, that the question before us should be answered in the affirmative. There are, however, many points both of difference and resemblance between the two cases. A copyhold estate is as capable of being aliened, either absolutely or conditionally, as

an estate of freehold; but the latter is held absolutely, while the tenure of the former, nominally, at least, is at the will of the lord. Further, if title-deeds have been lost or destroyed, this may materially affect the title, and even render it unmarketable; whereas, if the original copies of court rolls cannot be found, fresh copies may be obtained from the steward of the manor. The question, however, important to the argument is, do these and other obvious points of difference negative the conclusion, that copies of court rolls, as well as title deeds, are *evidence of ownership;* for this is the ground on which the decision must ultimately rest (*a*).

Suppose, again, the case of a man living in one of the English colonies, and there making his will, by which he bequeaths his residuary estate, "à mes plus proches parens à Londres"—what is the import of these words? No question can arise as to what is meant by "plus proches parens," it having been repeatedly decided, that "nearest relations" signify next of kin, according to the statute of distributions. The only difficulty then is, as to the effect of the expression "à Londres." Do these words make part of the description which the relations must bear, to be entitled under this bequest; or are they merely descriptive of the place in which the testator supposed his relations to reside? In the one case, their residence in London is a *condition,* which the

(*a*) It is hardly necessary to add, that the Courts have decided that an equitable mortgage *can* be created by depositing copies of the court rolls. See Book III. ch. ii. of this Essay.

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relations must fulfil, *i. e.* a description which they must answer; in the other, it is immaterial whether the testator has or has not correctly described the place of residence of those who are sufficiently ascertained by the general denomination "plus proches parens." Now, it has been held that, where a resident in the East Indies bequeathed his residuary estate to his "nearest relations in *Ireland*," these words were meant only to designate the place in which the testator supposed his relations to reside(*a*); hence it may be inferred, that, in the present case, the next of kin, whether resident in London or not, will be entitled. It might be objected, however, that between "London" and "Ireland," the points of difference as well as resemblance, are both numerous and great: and undoubtedly such is the fact. But the question important to the argument is, do any of these circumstances shew, that, in the case before us, the testator meant to make residence in London an indispensable *condition;* for otherwise the analogy is complete.

XVI. These instances, though others more complicated might have been cited, will serve to illustrate the importance of the rule in question; but the habit of practically regarding it, will be best ac-

(*a*) *Smith* v. *Campbell*, 19 Ves. 400. Supposing residence in London to be a *condition*, various and very difficult questions might then arise: such as whether the testator meant residence in the *city* of London, or in London in the popular sense of the word? and whether he meant residence at the date of his will, or at the time of his death, or how otherwise?

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Study of Reports.

quired by a diligent study of the Reports; carefully analysing, in each case, the arguments of counsel, and then comparing them with the judgment ultimately delivered. It has indeed been said, that, in reading the Reports, the arguments of counsel ought to be passed over, and the facts of the case and judgment alone considered; on the ground that the sophistry of the advocate may mislead, or at least give an undue bias to the mind. Undoubtedly this may happen, if the student forgets that each counsel argues *as* an *advocate*, *i. e.* not with the view of determining which party is in the right, (for that is an irrelevant question, and within the province of the judge alone), but of proving his own client's case (*a*);

Arguments of counsel.

(*a*) And yet this is often made the theme of vapid declamation against barristers, as if, in advocating their client's cause, without regard to the ultimate question of right, they were guilty of some moral offence; overlooking the important fact that they know only *one side*. Dr. Johnson, who of all men was least likely to sanction the slightest laxity in morals, puts the question in its true light. "I asked him," says Boswell, "whether, as a moralist, he did not think the practice of the law, in some degree, hurt the nice feelings of honesty?" Johnson.—"Why, no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a judge." Boswell.—"But what do you think of supporting a cause which you know to be bad?" Johnson.—"Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself, may convince the judge to whom you urge it; and if it does convince him, why, then, sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident

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and particularly if he is also led at the same time to confound the *skill* of the counsel as an *advocate* with his *knowledge* as a *lawyer;* for then he will be apt to infer, that the arguments of one of high legal authority must needs be more conclusive than those adduced by one of less repute. Few, however, I think, are likely to be influenced, at least permanently, by such obvious fallacies as these; for, in the *judgment* of the Court, they possess a decisive *test,* by which the sophistry of counsel may be at once detected and exposed. If they do swallow the poison, they at the same time take its antidote.

Influence of the will upon the judgment.

XVII. There often exists, however, a bias or prejudice, long ago remarked by Bacon (*a*), in favour of those arguments that tend to a conclusion already adopted, or which one is disposed to adopt, that ought in all studies, whether of law or any other science, to be most vigilantly watched, and as resolutely opposed. It cannot have escaped observation, that the same arguments which are received by some as cogent and conclusive, will often be rejected by others as weak and unsatisfactory. In some instances this may arise from an inequality in men's argumentative powers,

in your own opinion that a cause is bad, but to say all you can for your client, and then hear the judge's opinion." Boswell's Life of Johnson, ii. 49, sixth edit.; see also Boswell's Tour to the Hebrides, p. 15, third edit.

(*a*) "Intellectus humanus luminis sicci non est; sed recipit infusionem a voluntate et affectibus; id quod generat *ad quod vult scientias:* quod enim mavult homo verum esse, id potiùs credit." Nov. Org. lib 1. aph. 49.

or from a want of attention on their part, occasioned either by that indolence of mind which rests in implicit assent, rather than undergo the labour of thinking, or else by their being confident of their own knowledge, and thus weigh not what is said (*a*). But it will, I believe, be more frequently found rooted in the prejudice above noticed, which leads the *judgment* to acquiesce too readily in what is conformable to the *will;* and, on the other hand, to dissent from what is opposed to it. Indeed this latter remark has long been embodied in one of those popular proverbs (*b*) which, though homely in expression, often contain wholesome truths. They are the "condensed good sense of the people."

Example of inductive analysis.

XVIII. Having premised these general observations on the character of the present study, and the method of conducting it, it may be useful, before dismissing the subject altogether, to explain more particularly the nature of that procedure which I have recommended, by an actual example: suppose, *e. g.* the "Admissibility of Papers to Probate," were the subject proposed to be investigated (*c*). Probably the first question that would occur to one engaged in this inquiry would be, whether the admissibility of a paper to probate depends on its being of

(*a*) See Tripos, ch. 1, art. 3, p. 2; ch. x. art. 8, p. 66.

(*b*) "Convince a man against his will,
He's of the same opinion still."

(*c*) In another work (Recital Book, App.) I have treated of this subject, it being one almost wholly neglected by the text-writers. In any future edition, however, the note referred to will be withdrawn.

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any *particular form;* for, in many other cases, we perceive this to be essential: as, that a will of real property must be signed—that a deed must be sealed—that incorporeal hereditaments can be conveyed only by grant, &c. Now, if we find from decided cases that those papers which *have* been held admissible are not of the same form, but, in fact, vary from each other in almost every conceivable way, the question must be answered in the negative; while, on the other hand, if the form of each proves to be identical, the inference is, that *that* form is essential: though this conclusion, it must be observed, would not be so decisive of the question as the other, because the *sameness* of form might arise from some rule of law not at all connected with "probation."

Rules.

XIX. Now, we find that in *Green* v. *Proud* (*a*), an indented deed containing testamentary expressions, and made between father and son, by which the one, in consideration of a sum of money, agreed to pay the other's debts, was admitted to probate. So, in *Shergold* v. *Shergold* (*b*), a deed of gift, in consideration of sixpence, to take effect after the death of the giver, was held to be testamentary; and the court accordingly decreed administration with the deed annexed. And a similar decision was pronounced in *Mackwick* v. *Taylor* (*c*), where the

(*a*) 1 Mod. 117.

(*b*) Prerog. 1714, cited by Sir John Nicholl in *Thorold* v. *Thorold*, 1 Phil. 10.

(*c*) Prerog. 1722, Ib.

instrument in question was, in like manner, in the form of a deed of gift, to take effect after death. So, in *Corp* v. *Corp* (*a*) and *Thorold* v. *Thorold* (*b*), which differed only in this, that the testamentary expressions in the former case were less explicit, perhaps, than those in the latter, the court held that a paper denominated a deed of gift was admissible. Again, in *Rigden* v. *Vallier* (*c*), a deed by which property was granted amongst children, to take effect after payment of the funeral expenses of the grantor, was also held to be entitled to probate. So, in *Hickson* v. *Witham* (*d*), a writing, purporting to be an indenture, but declared by the party to be his last will and testament, and by which he gave several legacies and appointed executors, was pronounced to be admissible. In like manner it has been held that an assignment of a bond by indorsement (*e*), receipts for stock and bills indorsed "for Mrs. Sabine" (*f*), letters (*g*), marriage articles (*h*), promissory notes, and notes payable to executors to evade legacy duty (*i*), Scotch settlements in the form of con-

(*a*) Prerog. 1793, cited by Sir John Nicholl in *Thorold* v. *Thorold*, 1 Phil. 10.

(*b*) 1 Phil. 1.

(*c*) 2 Ves. sen. 252; 3 Atk. 731.

(*d*) Fin. Rep. 195: S. C. 1 Ch. Cas. 248; Vin. Abr. tit. "Devise," (A. 2.) pl. 5.

(*e*) *Musgrave* v. *Down*, cited by Sir John Nicholl in *Masterman* v. *Maberley*, 2 Hagg. 247.

(*f*) *Sabine* v. *Goate*, Ib.

(*g*) *Drybutter* v. *Hodges*, Ib.; *Manly* v. *Lakin*, 1 Hagg. 130; *In the goods of Dunn*, Ib. 488; *Denny* v. *Barton*, 2 Phil. 575; *Habberfield* v. *Browning*, cited in *Matthews* v. *Warner*, 4 Ves. jun. 200; *Cobbold* v. *Baas*, Ib.

(*h*) *Marnell* v. *Walton*, cited by Sir John Nicholl in *Masterman* v. *Maberley*, 2 Hagg. 247.

(*i*) *Maxee* v. *Shute*, Ib.

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tracts (*a*), unexecuted bonds (*b*), paper reciting and confirming marriage articles (*c*), a "memorandum (*d*)," deed poll (*e*), checks on bankers (*f*), &c., are equally admissible to probate, if of a testamentary character.

From these instances of indisputable authenticity, in which every variety of form occurs, we are authorized, according to the rule above laid down, to draw this conclusion, viz. Prop. I.—"Whatever may be the form of the paper propounded, yet if in other respects admissible, it will be admitted to probate (*g*)."

(*a*) *Hog* v. *Lashley*, cited by Sir John Nicholl in *Thorold* v. *Thorold*, 1 Phil. 11: S. C. 3 Hagg. 415, n.

(*b*) *Masterman* v. *Maberley*, 2 Hagg. 235.

(*c*) *Walton* v. *Walton*, 14 Ves. 318.

(*d*) *Dime* v. *Munday*, 1 Sid. 362.

(*e*) *Habergham* v. *Vincent*, 2 Ves. jun. 204, 231; *Rigden* v. *Vallier*, 2 Ves. sen. 255, 258.

(*f*) *Bartholomew* v. *Henley*, 3 Phil. 317.

(*g*) In connection with the proposition above laid down it is important to remark, that, "when a testamentary paper expressly refers to another document already written, and the identity can be clearly made out, such document, if necessary, will be considered as incorporated in the testament, and construed as part of it. *Metham* v. *Duke of Devonshire*, 1 P. Wms. 529, 2 Ves. jun. 228; *Molineux* v. *Molineux*, Cro. Jac. 145; Vin. Abr. tit. Devise (A. 3); *Lord Lansdown's* case, 10 Mod. 99. And here it may be remarked, that cases have occurred where a clause, fraudulently introduced into a will, has been expunged by the court; where omitted by mistake, supplied. But in each instance there existed, first—ambiguity on the face of the will itself; and, secondly, evidence indisputably proving that the insertion or omission was contrary to the testator's intention. *Travers & Edgell* v. *Miller*, 3 Add. 226; *Bayldon* v. *Bayldon*, Id. 232; *Fawcett* v. *Jones*, 3 Phil. 434; *Draper* v. *Hitch*, 1 Hagg. 674, 677; *Harrison* v. *Stone*, 2 Hagg. 537, 550; *Shadbolt* v. *Waugh*, 3 Hagg. 570; *Blackwood* v. *Damer*, cited in 3 Phil. 458; S. C. 3 Add. 239." Recital Book, App.

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1. Negative proposition.

XX. It is obvious that this proposition is, in substance, merely *negative*, viz. that no particular form is necessary; it does not affirm any thing to be essential, but denies only what one might be led antecedently to conjecture as such. And this, be it observed, is a most important step in the process of Induction; for, by *excluding*, in the present case, the question as to "form," which complicated the inquiry, it narrows the field of investigation, and brings us nearer to the object aimed at. Hence Bacon lays it down as a fundamental rule in his philosophy, to *begin* with negatives; and after every necessary exclusion has been made, then (and not till then) to proceed and end with affirmatives (*a*); alleging that if the opposite method be adopted, our conclusions will be mere conjectures—not principles rightly induced, but rather figments of the mind. Conformably to this view, Bacon himself, when treating of the nature of a use, considers, first, what it is not, and then what it is; "for," says he, "it is in the nature of all human science and knowledge to proceed most safely by negative and exclusion, to what is affirmative and inclusive (*b*)."

Utility of negation and exclusion in the inductive process.

XXI. Again, another obvious question, suggested also by analogy, would be, whether, as a testamentary paper need not be signed or sealed, or be of any other particular form, it ought not at least to be written or perused by the testator, or at all events read over to him. Now, in *Lewis* v. *Lewis* (*c*), oral

(*a*) Nov. Org. lib. ii. aph. 14.
(*b*) Bacon, xiii. 315. Reading on the Statute of Uses.
(*c*) 3 Phil. 109.

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instructions for a testament were given to one who, having reduced them into writing, was to transmit them to a solicitor. Before a formal paper could be executed, the party died; and the Court pronounced for the instructions. In this case, however, and in all others of a similar nature (*a*), proof was required—first, that the instructions had been reduced into writing during the lifetime of the deceased; secondly, that the written document was conformable to the instructions; and, thirdly, that the further completion of it was prevented by inevitable necessity, or the act of God. It is plain, however, that none of the circumstances above mentioned are conditional, *i. e.* essential to probation. Another negative proposition, therefore, may be laid down, viz. Prop. II.—"If in other respects admissible, a paper need not be written or perused by the testator, nor read over to him."

2. Negative proposition.

XXII. Having proceeded thus far by "negative and exclusion," let us now consider what may be in-

(*a*) *Gardner* v. *Smith*, in 1727, cited by Sir John Nicholl in *Sikes* v. *Snaith*, 2 Phil. 356; *Bury* v. *Bury*, 1791, Ib. 355; *Box* v. *Wetherby*, 1804, Ib. 355; *Wood* v. *Wood*, 1 Phil. 357; *Sikes* v. *Snaith*, 2 Phil. 351.—"There is no case that I am aware of, in which a bequest has been established, that has not been reduced into writing in the lifetime of the testator. The Court has gone the greatest possible length when it has pronounced for instructions which have been reduced into writing during the lifetime of the deceased, but which have not been read over to him. I cannot agree to the construction attempted to be put on the Statute of Frauds, that this would be a will by word of mouth." *Per* Sir John Nicholl, in *Rockell* v. *Youde*, 3 Phil. 145.

cluded and affirmed. It may, perhaps, be objected that we have not yet *exhausted* the former head. But who, it may be asked, could enumerate everything that is not essential? and what advantage would ensue even if it were possible? It is obvious, indeed, that in all inquiries conducted according to the present plan, there must, in practice, be some limit: and this is to be determined, not by any numerical rule, but from the *relation, or supposed relation, of each case or circumstance, with the subject-matter of investigation.* For suppose, *e. g.* that from the instances above cited (Art. XIX.) this conclusion had been drawn, and formally propounded as a negative fact, viz. that no money or other valuable consideration is essential to probation, would not such a proposition be justly characterised as puerile and useless? This, indeed, is so obvious when stated, that no one, it might be imagined, is likely to fall into the error in question. It will, however, I apprehend, be found to be more common than could have been antecedently supposed; particularly amongst those who, from some peculiarity of temperament or constitutional infirmity of mind, are *habitually doubtful in excess,* which often leads them to distrust even the most conclusive reasoning.

Rule as to negative instances.

XXIII. With respect to "affirmative instances," they are either direct or indirect—direct, where the point in question was expressly decided—indirect, where it was only implied in the decision. Thus, the case of *Lewis* v. *Lewis,* already mentioned, is a *direct* affirmative instance of a paper being ad-

Affirmative instances.

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mitted to probate, which consisted of instructions communicated to one who was to transmit them to a third person, the testator's solicitor. But it is also an *indirect* affirmative instance of what is implied, viz. that instructions will be pronounced for, when communicated to, and reduced into writing by the solicitor himself. I have noticed this distinction, principally for the purpose of remarking that an attempt is often made in argument to discredit the latter class of instances, on the ground that the attention of the Court was not directed to the point. This, however, would in most cases imply judicial negligence, which ought not to be hastily presumed, and still less made the occasion of overruling what has become, emphatically, *a law.* (Vide Art. VII.) But to return to the subject more immediately before us: an attentive examination of the cases above cited will shew, that, though the papers admitted to probate were written sometimes by the testator himself, sometimes under his personal dictation, and, on other occasions, in his absence, from oral instructions which had been previously given; yet, in every instance, the paper in question was written *during the lifetime of the deceased:* and this, in many cases, is *expressly* held to be essential. Accordingly it may be thus laid down as an affirmative proposition, viz. Prop. III.—"The paper propounded must have been written in the lifetime of the deceased testator."

1. Affirmative proposition.

XXIV. Again, it will be perceived, that in each instance the Court either expressly held, or took for

granted, that the paper pronounced to be admissible contained the *final wishes* of the deceased in regard to the disposition of his *personal* estate—these two circumstances being conditional to probation. With respect to the latter, it is to be observed that in many cases it will happen that a paper relates both to personal and real property, but it is only so far forth as it affects the former that probate can be obtained. And here, it may be remarked, that whenever a paper is manifestly imperfect and unfinished (*a*) the legal presumption is, that the deceased had not *finally* made up his mind then to dispose of his property, and consequently such a paper is not entitled to probate (*b*). This presumption, however, may be rebutted by extrinsic evidence, accounting for its state by shewing either that the deceased was prevented from completing, or that he had abandoned the intention of finishing it, meaning that it should operate in that *very form*, without any further act (*c*). Accordingly it is held, that, where the paper propounded is unfinished, yet if proved to contain the final intentions of the deceased, and that the finishing was prevented by inevitable necessity, or the act

(*a*) "A paper may be complete or incomplete—*complete*, when it is apparent on the face of the paper that the testator did not mean to do any further act to give it validity—incomplete, when it is not reduced to that form in which the deceased purposed to leave it, as an operative testamentary paper. 1 Hagg. 86; Eccl. Rep. 30." Recital Book, App.

(*b*) *Satterthwaite* v. *Satterthwaite*, 3 Phil. 1, 628, 409; *Cundy* v. *Madley*, 1 Hagg. 140; *Jameson* v. *Cook*, Ib. 82, 253.

(*c*) *Per* Sir John Nicholl, in *Wood* v. *Medley*, 1 Hagg. 670; *Finncane* v. *Gayfrere*, 3 Phil. 409; *Forbes* v. *Gordon*, Ib. 628.

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of God, it will be admitted to probate (*a*). And again, if the paper propounded is unfinished, yet, if it can be proved that it contains the final intentions of the deceased, and that he had abandoned the intention of finishing it, meaning that it should operate in its existing state, it will be admitted to probate (*b*). And it may be added, that, where there is a regular will, and another paper begun, as a new will, which the testator has been prevented, by the act of God, from completing, the two papers may be taken together as the will of the deceased, and operation, *pro tanto*, be given to the latter paper (*c*), provided the proof of final intention is clear (*d*).

(*a*) *Forbes* v. *Gordon*, 3 Phil. 614; *Musto* v. *Sutcliffe*, Ib. 105; *Lewis* v. *Lewis*, Ib. 109; *Thomas* v. *Wall*, Ib. 23; *Scott* v. *Rhodes*, 1 Phil. 12; *Huntington* v. *Huntington*, 3 Phil. 213; *Jameson* v. *Cook*, 1 Hagg. 82; *Worlich* v. *Pollett*, cited in Com. Rep. 452; *Smith* v. *Ashton*, Vin. Abr. tit. Devise (A. 2), pl. 4.

(*b*) *Friswell* v. *Moore*, 3 Phil. 135, 3 Phil. 5; *Bone & Newsam* v. *Spear*, 1 Phil. 345; *Billinghurst* v. *Vickers*, 1 Phil. 187; *Harris* v. *Bedford*, 2 Phil. 177; *Dickenson* v. *Dickenson*, 2 Phil. 173; *Read* v. *Phillips*, 2 Phil. 123; *Buckle* v. *Buckle*, 3 Phil. 323; *Habberfield* v. *Browning*, cited in *Matthews* v. *Warner*, 4 Ves. jun. 200; *Cobbold* v. *Baas*, Ib.

(*c*) "If this principle," observes Sir John Nicholl, "was rightly understood in other courts, there would seldom be much question about cumulative legacies; for, where a paper is codicillary, and two legacies are given to the same person, they are cumulative. Where instructions are pronounced for, *as containing together* a will, that is, where there is a complete will, and an instrument, intended as the inception of a new will, but not completed, the latter legacy supersedes and revokes the former, and is substituted in the place of it." 2 Phil. 312.

(*d*) *Per* Sir John Nicholl, 2 Phil. 35; *Harley* v. *Bagshaw*, 2 Phil. 48; *Goldwyn & Aspenwall* v. *Coppell*, cited by Sir John Nicholl, in *Harley* v. *Bagshaw*, 2 Phil. 51; *Ingram* v. *Strong*, and *Roberts* v. *Lawrence*, 2 Phil. 294, 312.

Thus, in *Goldwyn & Aspenwall* v. *Coppell* (*a*), there was a will regularly executed in Jamaica. The deceased gave instructions for an entire new will; before he had disposed of the residue he became incapable:—the Court pronounced for the two papers, as containing together the will. And in *Harley* v. *Bagshaw* (*b*), three papers, under the like circumstances, were pronounced for, as containing together the will of the deceased.

XXV. What are the circumstances which will raise a legal presumption that a paper is deliberative only? and what sufficient to rebut such a presumption when raised, and to establish a final intention? —are questions that often occasion much embarrassment. In *Ravenscroft* v. *Hunter* (*c*), there were alterations in ink, in the margin and body of the will, made with care, and conformable to long-entertained and lately-expressed intentions; and the Court held, that the will so altered, contained the testator's final intentions, and was entitled to probate. In this case, observed Sir John Nicholl, "the alterations might be in some measure deliberative, as to *form*; for the testator might intend to effect his purpose more regularly by a codicil, and through an attorney, but not as to the disposition, since upon that he had made up his mind, and considered, meant, and thought, the paper would operate as now altered." If alterations are made in *pencil* only, the general presumption is, that they are deliberative; but when in *ink*, they are considered final and absolute: and

(*a*) *Ut sup.* (*b*) 2 Phil. 48. (*c*) 2 Hagg. 68.

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when they are of both sorts, the presumption as to each is stronger (*a*). Presumptions of this kind, like all other presumptions, may be strengthened by circumstances. Thus, if the interlineations and obliterations have rendered the sense incomplete, and the paper unintelligible, the natural and legal inference is, that they were not intended to be final; and this inference is still more forcible, if the alterations were made by one distinguished for habits of accuracy (*b*). Again, in *Reay* v. *Cowcher* (*c*) it was held, that when a codicil, disposing of realty as well as personalty, is signed only by initials, and unattested, and with many interlineations, the presumption is that it is deliberative. Many other cases might be adduced in illustration (*d*). "The legal principles as to imperfect testamentary papers of every description vary much," observes Sir John Nicholl (*e*), "according to the stage of maturity at which those papers have arrived. The presumption of law, indeed, is against every testamentary paper not actually *executed* by the testator; and *so* executed, as it is to be inferred, on the face of the paper, that the testator *meant* to execute. But if the paper be complete in all *other* respects, that presumption is slight and feeble, and one comparatively easily repelled. For *intentions, sub modo* at

(*a*) *Hawkes* v. *Hawkes*, 1 Hagg. 322.

(*b*) *Edwards* v. *Astley and others*, 1 Hagg. 490.

(*c*) 2 Hagg. 249.

(*d*) See *Satterthwaite* v. *Satterthwaite*, 3 Phil. 1; *Forbes* v. *Gordon*, 3 Phil. 614; *Buckle* v. *Buckle*, 3 Phil. 323; *Parkin* v. *Bainbridge*, 3 Phil. 321; *Thomas* v. *Wall*, 3 Phil. 23; *Harris* v. *Bedford*, 2 Phil. 177; *Dickenson* v. *Dickenson*, 2 Phil. 173; *Read* v. *Phillips*, 2 Phil. 122; *Paske* v. *Ollat*, 2 Phil. 323.

(*e*) *Montefiore* v. *Montefiore*, 2 Add. 357, 358.

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least, need not be *proved* in the case; that is, the Court will *presume* the testator's intentions to *be* as expressed in *such* a paper, on its being satisfactorily shewn that its not being executed may be justly ascribed to some *other* cause, and not to any *abandonment* of those intentions, so expressed, on his, the testator's part. But, when a paper is unfinished, as well as unexecuted, (especially when it is just begun, and containing a few clauses or bequests), not only must its being unfinished and unexecuted be accounted for, as above, but it must also be *proved*, (for the Court will not *presume* it), to express the testator's intention, in order to repel the legal presumption against its validity. It must be *clearly made to appear*, upon a just view of *all* the facts and circumstances of the case, that the deceased had come to a *final* resolution in respect to it, as far as it goes; so that, by establishing it, even in such its imperfect state, the Court will give effect to, and not thwart or defeat the testator's real wishes and intentions, in respect to the property which it purports to bequeath, in order to entitle *such* a paper to probate, in any case, in my judgment" (*a*).

From these remarks, however, and the cases above cited, we are authorized to lay down this additional affirmative proposition, viz. Prop. IV.—" The paper must contain the *final* wishes of the deceased as to the disposition of his *personal* estate."

2. Affirmative proposition.

XXVI. Finally, it will be observed, that it is essentially conditional to the testamentary character of a paper that it shall take effect, not during the

(*a*) *Per* Sir John Nicholl, in 2 Add. 357, 358.

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3. Affirmative proposition.

testator's life, but "after his death."—Now if we bring together this and the other propositions above laid down, which are so many particular inductions, this ultimate general conclusion may be announced,

Ultimate conclusion.

viz.—"All that is absolutely necessary to entitle a paper to probate is, that proof should be given that the paper was written in the lifetime of the deceased, and contains his final wishes as to the disposition of his personal estate after his death."

XXVII. I shall only add, in conclusion, that though the instance here given will exemplify, in some measure at least, the method of procedure above recommended; yet he who wishes for a perfect model of inductive analysis, must have recourse to other writers. One author there is to whom the student may be safely referred—so excellent indeed, in all respects, that of him it may be said, (in the words of Johnson), whoever would become a great lawyer, should *give his days and nights* to the writings of Mr. Fearne (*a*).

Mr. Fearne's writings recommended.

(*a*) It is not often, at least in modern times, that we are able to cite the opinion of a *divine* in favour of such a work as the Essay on Contingent Remainders. The celebrated Curate of Hatton, however, had it put into his hands by Mr. Hargrave, and when writing to the late Mr. Butler, he says, "I read your account of Mr. Fearne with seriousness, and almost sorrow. Not being a professional man, I was continually foiled by the Essay of Contingent Remainders, but I saw enough to convince me that his powers of reasoning were gigantic; and knowing that he had been persecuted by Lord Mansfield, I had very painful feelings in the transition from Fearne to Murray." Parr, viii. 514. The account alluded to, is given by Mr. Butler in his Reminiscences.

BOOK I.

OF ABSTRACTS OF TITLE.

CHAPTER I.

OF THE DUTIES OF THE SOLICITOR AND COUNSEL.

SECTION 1.

Of the Duty of the Solicitor.

SECTION 1.

Abstract of Title defined.

I. AN Abstract of Title (as I have observed already) is *an epitome of the evidences of ownership*, which the vendor must prepare at his own expense, and deliver to the purchaser (*a*). It ought then to be examined and verified by the purchaser's solicitor, who usually submits it to some conveyancing counsel, for the purpose of being advised, whether the Title of the vendor is good and marketable, *i. e.* such as a purchaser can be compelled to take. But, though it is the duty of the vendor to deliver the Abstract, yet equity considers it as equally incumbent on the purchaser to demand it; and accordingly where time is of the essence of contract, and the specified period has been suffered to elapse without making the requisite demand, the condition as to time will be treated as waived (*b*).

By whom to be prepared, delivered, and verified.

When delivery to be demanded.

(*a*) Prest. Abs. i. 34; Sugd. Vend. & Pur. i. 447.

(*b*) *Guest* v. *Homfrey*, 5 Ves. 818. As to "time" being of the essence of the contract, see Book iii. ch. i. of this Essay.

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Verification of Abstract.

II. The Abstract ought to be verified, *i. e.* compared with the original deeds and documents themselves, (and if erroneous, corrected), *before* it is submitted to counsel. In this respect, however, the practice is not uniform: some solicitors relying on the accuracy of the Abstract, defer verifying it until the opinion of counsel has been obtained, and sometimes even until the time appointed for executing the conveyance. But such delay, it is obvious, may often prove extremely prejudicial to the parties concerned. For, suppose a purchaser enter into a contract for re-sale *before* the Abstract has been verified by his solicitor, and from a subsequent examination of the title deeds, it appears, that the title is, in fact, unmarketable; he could not recover from the vendor those costs which he has himself incurred, and become liable to pay by reason of the subsale; being under such circumstances entitled only to his deposit and interest, with such expenses as are a *necessary* consequence of the original contract: as *e. g.* searching for judgments, perusing and verifying abstract, counsel's opinion, &c. (*a*). It has, indeed, been doubted, even if the Abstract be first verified, whether in that case the purchaser would be entitled to recover the costs incident to his sub-con-

Consequences of delay.

(*a*) *Walker* v. *Moore*, 10 Barn. & Cr. 416; *Hodges* v. *Earl of Litchfield*, 1 Bing. N. C. 492; *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Drax* v. *Scroupe*, 1 Dowl. P. C. 71. But costs incurred in surveying the estate, preparing conveyance in anticipation of the purchase being completed, or in filing a bill for specific performance, are not considered as necessary consequences of the contract, and cannot be recovered. *Hodges* v. *Earl of Litchfield*, *ut sup.*

tract; for, according to Mr. Justice Littledale, it is contrary to the policy of the law, that a man should offer an estate for sale before he has obtained possession and a conveyance (*a*). Mr. Justice Bayley, however, (a great authority, particularly on all questions of this kind), considered, that if the Abstract has been examined with the deeds and found correct, the purchaser will be justified in acting on the faith of having the estate, and that if after that time a sub-contract is made, he will be entitled to recover the expenses attending it, if it fail in consequence of any defect of title (*b*). And if there were mala fides in the original vendor, then, but not otherwise, the purchaser may recover, not only the expenses incident to the sub-contract, but also such *profit* as would have accrued to him had it been carried into effect (*c*). It ought also to be borne in mind, that to delay verifying the Abstract until the opinion of counsel has been obtained, may not only, as we have seen, prove injurious to the purchaser, but may even amount to "professional negligence;" for, if *by reason* of the Abstract not having been first verified, the counsel formed a wrong opinion of the title which was acted upon by the solicitor, the latter would be held answerable to his client for any damages which he might in consequence sustain (*d*).

III. With the view of enabling the purchaser's so- Production of title-deeds.

(*a*) 10 Barn. & Cr. 422.
(*b*) 10 Barn. & Cr. 421.
(*c*) *Hopkins* v. *Grazebrook*, 6 Barn. & Cr. 31; 10 Barn. & Cr. 421.
(*d*) *Ireson* v. *Pearman*, 3 Barn. & Cr. 799.

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licitor to verify the Abstract, the vendor must produce the title-deeds and other evidences of ownership, either at his own residence, if in his custody; or if not, at the residence of the person possessed of them. If they are deposited at a considerable distance from the solicitor's place of abode, he is not justified, unless specially instructed by his client, in incurring the expense of a *personal* attendance; but ought, according to the usage of the profession, to delegate this duty to an agent on the spot. Even, if requested personally to attend, he should distinctly inform his client, that it is not usually considered necessary that such expense should be incurred; and this is the more imperative when the client is a trustee, having no personal interest in the matter (*a*).

Requisitions of counsel.

IV. Having obtained an opinion on the title, it is then the duty of the purchaser's solicitor to see that the various requisitions of counsel are complied with. If the vendor's answers are unsatisfactory, or occasion any difficulty in the mind of the soli-

(*a*) *Alsop* v. *Lord Oxford*, 1 Myl. & K. 566. "The seller," observes Sir Edward Sugden, "is bound to produce the deeds, in order that the abstract may be examined with them, although they are not in his possession, and the purchaser is not to be entitled to the custody of them. But, if they are in the possession of a third person, the purchaser's solicitor, *it seems*, must send to the place where the deeds are, in order to examine them with the abstract, and the seller must pay the expense of the journey." —Sugd. Vend. & Pur. i. 449. Since the judgment of Sir John Leach, M. R., in the case above cited, this latter position must of course be modified.

citor, it is the usual practice to lay the Abstract again before the same counsel, to advise on the sufficiency of such answers. If any difference of opinion still exist, the points in question are commonly submitted to the vendor's counsel; and thus the subject is thoroughly discussed. But, if the respective counsel cannot agree, the contract is then either rescinded, or made the subject of an action or suit. It often happens, however, that instead of involving themselves in litigation, the parties agree to submit the points in dispute to the arbitrament of some eminent practitioner, agreeing to be bound by his opinion, whatever that may be. And it is astonishing to one who has not considered the subject, how much litigation is prevented by having recourse to this species of domestic forum; indeed, it has been said, (and I believe truly) that the greatest proportion of the questions which arise upon the laws of real property, are determined by the opinions and consultations of conveyancers (*a*). Hence the respect which is uniformly shewn by the Courts to the settled practice of conveyancers, which, according to Lord Eldon (*b*), is "a very considerable authority."

V. It is also the duty of the purchaser's solicitor, Searches and

(*a*) Mr. Tyrrell's suggestions, Real Prop. Rep. App. i. 566; and see Park's Contre-Projet, p. 195, where there is a curious account of the number of law opinions given by Mr. Preston per week: it is stated that not more than three per cent. on the gross numbers went on to litigation.

(*b*) Turn. & Russ. 86; and see Notes and Illustrations (C).

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inquiries to be made by purchaser's solicitor.

either before or after an opinion has been taken on the Abstract, to make certain searches and inquiries, which though, strictly speaking, collateral to the title, may yet, if not attended to, be productive of most injurious consequences to a purchaser or mortgagee:—1. If the estate or any part of it be in the occupation of a tenant, but not otherwise (*a*), this alone is held to be sufficient notice of the terms of the lease: inquiry, therefore, should be made of each tenant as to the nature and extent of his interest (*b*). So if one enters into an agreement for an underlease, the contents of the original lease ought, if possible, to be ascertained; because the underlessee has, in that character, constructive notice, *e. g.* of all usual covenants (*c*), and even of unusual ones, if he had an opportunity, by using due diligence, of discovering them (*d*).

Estates of tenants.

Original lease.

Lis pendens.

2. Again, if any suit be depending, whether contentious or not, which relates to the estate in question, (though not if it be wholly collateral to it, as *e. g.* mortgage-money (*e*)); this is of itself notice, and any one dealing with the property must abide by the consequences of a decree (*f*). Accordingly,

(*a*) *Miles* v. *Langley*, 1 Russ. & Myl. 39.

(*b*) *Daniels* v. *Davison*, 16 Ves. 249.

(*c*) *Flight* v. *Barton*, 3 Myl. & K. 282.

(*d*) *Cosser* v. *Collinge*, Id. 283.

(*e*) *Worsley* v. *Earl of Scarborough*, 3 Atk. 392.

(*f*) Ex. gr.: "Should trustees for sale proceed to a sale after a suit in equity has been instituted to restrain them from selling, or to compel them to sell under the sanction and direction of the Court (*Walker* v. *Smallwood*, Ambl. 676); or, if creditors should file a bill against an heir, &c., to enforce the payment of their debts, a purchaser, even without actual

if there is the least probability of a pendency of suit, search should be made in the appropriate offices.

Crown debts.

3. Inquiry ought also to be made, whether the present or any recent proprietor has had any accounts with the Crown, or has given any security for any receiver or other public accountant; for "securities and engagements to the Crown bind the real estates of debtors, and also of their sureties, in most cases, from the time when the security to the Crown was given, or when the office or engagement in respect of which the debt has been contracted was acquired or entered into (*a*):" And such estates, during the existence of the debt or any part of it, or until a *quietus* is obtained, are extendible by the Crown, notwithstanding any change of ownership. "The fact, however," as Mr. Tyrrell observes, "can never be ascertained with certainty; because there is no place in which the existence or the amount of the debts due to the Crown can be discovered; but it is usual, and is considered necessary, to ask the solicitors and connections of the parties, if they are aware of any such debts? and to make inquiries in any of the public offices with which the circumstances of an owner render it probable that he may have had any dealings (*b*)."

notice of such suit, would be implicated by the suit, so far that a Court of equity might rescind the sale, and leave the purchaser to follow the trustees, heir, &c., for the reimbursement of his money." Prest. Abs. iii. 355.

(*a*) Real Prop. Rep. ii. 30. For a more detailed discussion of the subject of crown debts, see Prest. Abs. i. 193; ii. 290—353.

(*b*) Tyrrell, Real Prop. Rep. App. i. 517.

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Judgments.

4. Judgments too should, in general, be searched for; because when docketed, *i. e.* put into "an alphabetical dogget" or list, (according to 4 & 5 Will. & M. c. 20), they become liens on the estates of those against whom they have been entered up. The practical rule is, "to search during the last ten years, but if any judgment be found, to extend the search ten years anterior to the date of that judgment; and so on, back to the time when the debtor attained his majority (*a*)." The search, however, is seldom extended over more than a period of twenty years (*b*). If any judgment be found against the name of an owner, the person bound to produce a good title must procure it to be satisfied, or else shew that it is applicable, not to the person supposed, but to another of the same name. And for this latter purpose, it is usual to require a certificate from the solicitor who obtained the judgment, stating the residence and description of the person against whom it was entered up (*c*). If, however, the name be one of common occurrence, so many certificates would then be called for, that in practice it would be impossible to obtain them; and accordingly, in such cases, "a willing purchaser," says Mr. Tyrrell, "is usually satisfied with an affidavit or certificate from the solicitor of the owner, that he is confident that none of the judgments relate to him; but it has not," he adds, "been decided whether the objection does not render a title unmarketable."

(*a*) Prest. Abs. i. 191; iii. 337.

(*b*) Real Prop. Rep. ii. 30.

(*c*) Tyrrell, Real Prop. Rep. App. i. 517.

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Cases where judgments need not be searched for.

In some instances, however, the search for judgments may safely be dispensed with. Thus, if the purchaser be, at the time of his contract, seised of the legal estate as mortgagee, he need not search for any judgments entered up subsequently to the execution of the mortgage (*a*). So, if he has the estate conveyed to him by force of a power of appointment, it is unnecessary to search for judgments suffered since the creation of the power: it being an established rule, that when a power is executed, the appointee takes under the creator of the power, and not under him who executes it (*b*). Neither is it necessary to search for judgments when the purchaser obtains a clear title to a subsisting legal estate, whether freehold or term of years, anterior to the usual period of search; though this will not protect him from judgments of which he has notice (*c*).

Mortgagee.

Appointee.

Outstanding legal estate.

5. Again, if the property in question be in Middlesex, Yorkshire, or the Bedford Level, the local registers ought to be examined, not only with the view of ascertaining whether any incumbrances are

Registers.

(*a*) Sugd. Vend. & Pur. i. 541.

(*b*) *Doe* v. *Jones*, 10 Barn. & Cr. 463; *Tunstall* v. *Trappes*, 3 Sim. 301; *Eaton* v. *Sanxter*, 6 Sim. 517.

(*c*) Prest. Abs. iii. 339; Sugd. Vend. & Pur. i. 546. In the Hargrave MSS. (British Museum, No. 493, fol. 568), there is a copy of the celebrated case of Luxborough-house, where the point in question was, whether a legal estate outstanding in a trustee would protect a bonâ fide purchaser, without notice, against a crown debt? To which are added the opinions of Sir Lloyd Kenyon, Mr. Dunning, Mr. Ambler, Mr. Mansfield, and Mr. Holliday. The question was ultimately decided in the negative, though contrary, it is said, to the general opinion of the profession. *Rex* v. *Lamb*, 13 Pri. 649, M'Clel. 402.

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disclosed, but also whether the deeds and wills have been duly registered (*a*).

Acts of bankruptcy.

6. And here it may be useful to remark, that, if the vendor be subject to the bankrupt laws, any sale and conveyance by him may be impeached, in case a commission issues within two months afterwards (*b*). If indeed an act of bankruptcy has been already committed, that is a decisive objection to specific performance; because, until the period fixed by act of parliament (viz. twelve calendar months) has expired, it cannot be known with certainty to whom the estate belongs, whether to the vendor or his assignees (*c*).

Supersedeas.

7. So, if the estate contracted for, has been recently purchased under a commission, or under any order in bankruptcy, it ought to be ascertained that no supersedeas was issued, or proceedings for a supersedeas taken, within twelve calendar months from the date of the commission; for, until that period has elapsed, the transaction is liable to be impeached (*d*).

Acceptance of unmarketable title.

VI. To these observations on the duty of the solicitor I shall only add, that whenever an *unmarketable* title is accepted, care should be taken that such acceptance is the personal act of the purchaser himself, and not of his solicitor. Indeed, it has

(*a*) Tyrrell, ut sup.; Sugd. Vend. & Pur. i. 549; Prest. Abs. iii. 99.

(*b*) 6 Geo. 4, c. 16, s. 81.

(*c*) *Lowes* v. *Lush*, 14 Ves. 549; *Cann* v. *Cann*, 1 Sim. & Stu. 284; and see *Franklin* v. *Lord Brownlow*, 14 Ves. 550.

(*d*) 6 Geo. 4, c. 16, s. 87.

often and justly been remarked, that any gratuitous assumption of responsibility on the part of the latter is neither consistent with nor called for by his professional duty.

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Of the Duty of Counsel.

Province of conveyancing counsel.

VII. Having thus treated of the duty of the solicitor, I shall now proceed to offer some observations on that of the conveyancing counsel. It is his peculiar province to determine, whether the Title set forth in the Abstract is such as a purchaser can be compelled to take. And this will be found to involve a twofold inquiry:—1st. Whether a good title is deduced; and if so, 2ndly, whether it is supported by adequate evidence; for, it is obvious that one may be the rightful owner, and yet not have the means of proving it. Instead, however, of treating of the "Title to be Deduced," and of the "Evidences of Title" as subordinate to the subject of this section, I shall consider these important topics independently, and at large, in the two following chapters; offering only in this place some practical suggestions relative to the investigation of titles.

Legal apprehension essential to a right understanding of abstract.

VIII. It is a notion very common amongst those who have had but little experience in business, that, when reading an abstract of title, the points of difficulty will *suggest themselves* to the mind; and that then the student may inform himself of the law, and

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conclude accordingly. So far, however, from this being the case, it will invariably be found that to one whose knowledge is limited and superficial, none but the most trite and obvious questions will occur; the more occult, and often most important, being sure to escape attention: just as a person when using a single lens sees nothing of those asperities which a compound one would have disclosed. The reason of this is obvious: he who is ignorant of the laws of property cannot be capable of judging whether or not any given state of facts is conformable to those laws, and what are the consequences which result from conformity, or from the want of it. And it is equally plain that fitness for such a task is in proportion only to one's knowledge and practical skill. "It demands," as Sir William Blackstone observes, "a sort of legal apprehension, which is no otherwise to be acquired than by use and a familiar acquaintance with legal writers (*a*)."

Contract and conditions of sale to be first considered.

IX. In entering upon the investigation of any title, we should consider in the first place what is the effect of the contract and conditions of sale; for, although, as will appear hereafter, a good title is a matter not of contract, but of right; yet this right may be restrained, and even waived altogether, by the express agreement of the parties. The nature, too, of the estate and the degree of interest contracted for must be ascertained. Besides, it often becomes necessary, owing to the death of one or both of the parties before the contract has been car-

(*a*) Bla. Com. i. 13.

ried into effect, to apply the doctrine of *conversion*, which gives rise to a most important train of consequences connected with the rights and liabilities of those who represent the original parties, and upon whom the legal and equitable interests devolve. As I shall have occasion hereafter, (vide Book III. Ch. I.) when treating of the contract and its consequences, to explain this subject in detail, it is unnecessary to enter upon any discussion of it in this place (*a*).

Analysis of Abstract.

X. If the title be very complicated, much labour will be saved by distributing it into separate branches, so that each may be considered apart from the rest. One and the same abstract will often relate to different estates held by separate titles, or to several shares of the same estates, or to distinct interests in such estates or shares (*b*): and when this is the case, the unpractised student, without the aid of analysis, would soon find himself involved in a maze of difficulty, without any clew to guide him. I do not mean that the analysis ought always to be set down *in writing*; for although such a practice is oftentimes useful, yet when once hardened into a habit, it "shackles the mind, and renders it dependant on the habit:" just as it has been remarked (*c*) of those who are accustomed to reason altogether about mathematical signs and figures—they know not how to reason without them. And hence the

(*a*) See also Prest. Abs. i. 66; and Sugd. Vend. & Pur. i. 186—191.

(*b*) Prest. Abs. iii. 191.

(*c*) Berkeley, Anal. yst, Qu. 38, ii. 451.

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practice of common-placing one's reading, so far from strengthening the memory, actually weakens it; for instead of encouraging and giving free play to the exercise of attention (which is the life of memory) it substitutes for it a mere mechanical operation. The hand (as I have elsewhere remarked) engrosses the business of the head. He, indeed, who would read with real advantage, must not only follow the author through the whole train of his reasonings, comprehending every proposition propounded; but ought to enure himself to the practice of thinking the subject over in his own way, keeping the positions to be established constantly in view, and testing the argument at every step. In doing this, the reasonings of the writer become insensibly decomposed, if I may so speak; and the mind, acting with the assimilating power of an organic body, recombines the several parts according to its own established habits of association; and thus our acquired knowledge becomes as firmly radicated in the memory, as if it were the fruit of original research.

Methods of analysing Abstracts.

XI. As to the method to be adopted in analysing the Abstract, that will depend partly on the circumstances of the case, and partly on each person's own peculiar habit of mind. No plan, therefore, can be laid down which will be universally applicable. The following model, however, (adopted with a few verbal alterations) from Mr. Preston's "Treatise on Abstracts," will furnish some useful hints on this subject.

ANALYSIS

OF

AN ABSTRACT OF TITLE.

INHERITANCE.	* (A) TERM OF 1000 YEARS.
1763 *May* 8 & 9—**John Stiles** conveyed to NICHOLAS STILES, in fee.	1781 *July* 10—1,000 years, Demise to **Richard Fox**, redeemable.
1764 *May* 10—**Nicholas Stiles** devised to JOHN STILES, for life; Trustees for his life, to support; First and other Sons successively in tail male: Remainders, over.	1782 *June* 5—He assigned to **James Crowe**, redeemable.
	1783 *May* 4—He assigned to **Richard Elliott**, redeemable.
1771 *Oct.* 10—**Testator** died. *Oct.* 13—Will proved in Canterbury.	1782 ELLIOTT'S Will; RICHARD CRISP, Executor.
1773 *Dec.* 1—**Richard**, first son.	1784 Probate in Prerogative Court of Canterbury
1781 *June* 10—**Richard** attained twenty-one.	1785 *June* 8—Executor to **Richard Fox**, to attend.
1781 *June* 12 & 13—Father and Son conveyed to **Humphry Toms**, tenant, for recovery. To the use of Father and Son's joint appointment; Father, for life, (died *May* 1, 1814); Son, fee (dead intestate).	
1781 **Trin. Term**—Recovery suffered. Son vouched and vouched over.	
1781 *July* 10—Term of part, to - - (A) * 1782 *June* 1—Term to - - - - (B) † 1783 *Oct.* 10—Term of all to - - - (C) ‡	
1792 *July* 10—Son died intestate. Four Daughters and Heirs } **Mary, Jane, Emma, Joanna.**	

(1)—**Mary's Share.**	(2)—**Jane's Share.**
Married RICHARD EDGE, and died *June* 16, 1816.	JANE, died intestate.
Thomas Edge, heir. His Wife dowable.	**Richard Edge**, tenant by the curtesy, Died *June* 20, 1816.
	THOMAS EDGE, EMMA, JOANNA } Heirs.
1830 *June* 1—Husband (THOMAS) and Wife levied a fine for the lawful uses of **Thomas Edge** to prevent dower.	For MARY'S Share - - *see* MARY (1) EMMA - - - - *see* EMMA (2) JOANNA - - - - *see* JOANNA (2)
1830 *June* 10—Demise and appointment to C. E.	
THOMAS EDGE, Bankrupt.	2,000 years redeemable. E. F. Executor. Probate in Prerogative Court.
1831 *April* 18—Bargain and Sale to K. L., M.N., O. P. } Assignees.	

STRACT OF TITLE.

† (B) Term of 500 Years.

1782 *June* 1—500 years.
Demise to **Thomas Rich**, redeemable.

1792 *July* 1—He assigned to **Thomas Hunt**, redeemable.

1793 *March* 8—Hunt died intestate.
Mary, his widow, obtained Administration from Prerogative Court.

1796 *June* 8—The Administratrix to **John Pinsent**, to attend.

He died intestate.

‡ (C) Term of 3,000 Years.

1783 *Oct.* 10—3,000 years.
Demised to **Timothy Brent**.

1792 *April* 1—He died intestate.

John Fix, Administrator,
from Court of Bishop of W.

1795 *Feb.* 10—Administrator assigned to **Richard Renchant**.

1793 *Dec.* 7—Will of Renchant:
A. B.
C. D. } Executors.
E. F.
E. F. survived; he had proved in Canterbury.

Executors of E. F. are
G. H.
I. K.
Both dead | Survivor died intestate.

1803 Letters of Administration de bonis non to Y. Z.

1804 *June* 1—Y. Z. assigned to X. Y. to attend.

(3)—**Emma's Share.**

Emma married Lawrence Hogg.

1813 *June* 1 & 2—Settlement of original ¼th on
Lawrence Hogg for life,
Trustees for life,
Emma, life,
First and other Sons tail,
Daughters tail,
Cross remainder,
Emma, fee.

One-fourth.	*One-third of One-fourth.*
Lawrence died, *June* 9, 1816. Emma died, *June* 12, 1816.	Emma joined with her Husband in a fine to the use of her Husband in fee.
Three daughters of the marriage: Anna. Jane. Margaret.	1816 *June* 9—He died intestate: Anna, Jane, Margaret } Co-heirs.

1830 *Jan.* 1 & 2—They by Lease, Release, and Fine, with Proclamations, conveyed to the use of A. B. in fee, in trust for C. D. in fee.

Legal:	**Equitable:**
1831 *Nov.* 10—A. B. devised to G. H. in fee all Trust Estates.	C. D. died intestate. E. F. Heir.

(4)—**Joanna's Share.**

Joanna,
Living, and unmarried.

One Fourth.	*One-third of One-fourth.*
Sept. 6—She demised this one-fourth to L. M. for 2,000 years, in mortgage for 2,000*l.* and interest.	No act done.

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Another method of analysing Abstracts.

XI. Mr. Preston also suggests another mode of analysing an Abstract, which, being more simple, is perhaps better adapted to ordinary cases. "Thus, suppose A. to be tenant for years, remainder to B. for life, remainder to C. in tail, remainder to D. in fee. The note of the abstract may be taken in this form:—

R. conveyed to, or to the use of
A. for years;
B. for life;
C. in tail;
D. in fee.

And then, in an outer margin, the deduction of title to the different estates may be traced in the following manner, thus:—

Against the name of A.

He died intestate; E. obtained letters of administration of his effects, and assigned to F., who died, having first made his will, and appointed G. his executor, &c. &c., who proved in the court of &c., and the said G. did &c.

Against the name of B.

B. died on the &c. [*or*, B. surrendered to C., *or*, conveyed to C. in mortgage, for life, *or*, for years, &c.]

Against the name of C.

C. suffered a recovery before the surrender to him, and in the lifetime of B., without the concurrence of the person in whom the freehold was vested; *or*,

C. suffered a recovery with the concurrence of the person in whom the freehold was vest-

ed; [*or*, he levied a fine, with proclamations, during the continuance of the estate of freehold; *or*, he died, leaving H. his heir in tail.]

And against the name of D.

D. barred by recovery; or, when the estate is not barred, or barrable, then the state of the title should be traced thus:—D. died intestate; K., his heir-at-law, conveyed &c.; *or*, D. made a will, and devised to &c., the devisee, having the inheritance in possession, married and conveyed. *N. B.* his wife is dowable; *et sic de sim.*"

According to this arrangement, the various observations occurring upon the abstract, will stand against the name of the person to whose estate they are applicable; thus compendiously setting forth the exact condition of the title to each estate (*a*).

Exposition of Mr. Preston's Analysis of an Abstract of Title.

XII. Adopting Mr. Preston's Analysis as a sort of *text*, let us consider some of the points which might arise when investigating such a title as the one in question. In the first place it is important to consider, whether the instruments comprised in the abstract are arranged according to order of time, or order of operation; for if this distinction be not attended to, it may lead to the most fatal errors. Suppose, *e. g.* that Nicholas Stiles, in the analysis above given, had executed his will, not *after* John's conveyance to him, but *before;* then, it is obvious, that if

(*a*) Prest. Abs. iii. 203.

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Importance of the arrangement of the instruments in abstract.

the abstract were read, according to the present arrangement, without any attention to the dates, one would be led to conclude that the will was an operative instrument: whereas, on the contrary, the devise would be void; inasmuch as the testator, at the time of making his will, had no seisin of the estate devised. If indeed he had previously contracted for the purchase of the estate, and his will contained adequate words of devise, the equitable interest would have passed, and upon payment of the purchase money by the testator's executors, the devisee would be entitled to call for a conveyance to him of the legal estate; supposing always the title to be marketable, or if not, that the purchaser had, during his life, bound himself to accept it. (Vide Book III. Ch. I. s. 1.)

Again; it is not uncommon, (as Mr. Preston remarks,) to give the contents of a settlement, or a recovery-deed, and then to introduce an abstract of the will; under the idea that they should be abstracted according to the order in which they operate upon the title, and not according to the order of their dates. Now, in reading the abstract, without any attention to the chronological arrangement, one would be led to consider the will as an operative testamentary instrument, having a due effect upon the title; whereas the contrary becomes obvious when we compare the dates; for it then appears that by the operation of the settlement or recovery, the will was revoked (*a*).

(*a*) Prest. Abs. iii. 192.

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Form of Assurance.

XIII. Nor is the *Form* of Assurance less to be considered. The conveyance from John Stiles to Nicholas, purports to pass the fee, and being by lease and release does in fact pass it, *that* being an appropriate form of assurance for such a purpose. But suppose there was no lease, nor (if an Irish instrument) any recital of any lease, and only a deed of release, a question would then arise, at least in a modern transaction, whether such an instrument would operate to convey the fee. As a release it obviously could not, for there is no privity of estate between the parties (*a*). If, however, the property were in the possession of one who is even only tenant from year to year (*b*), there would then be a *reversion* in John Stiles; and, as such an interest *lies in grant*, the release purporting to pass it would operate as a grant, though in form a release. As to the *execution* of the conveyance, that of course is essential to its operation whatever may be the form of assurance. What constitutes a legal execution will be fully considered hereafter; (vide Book II. Ch. VIII.); but it may be useful to remark in this place, that, if a conveyance be executed by attorney only, and the principal is dead, evidence of his death (viz. certificate of burial with an affidavit of identity) ought to be given, in order to show that the principal was living at the

(*a*) Co. Litt. 273. a.; Shepp. Abr. ii. 154; Touch. 324. I have heard Mr. Preston remark, that, in his opinion, the Abridgment is a more valuable work than even the Touchstone; both evidently being the production of Mr. Justice Dodderidge.

(*b*) *Doe* v. *Cole*, 7 Barn. & Cr. 243; *Botting* v. *Martin*, 1 Campb. 317.

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time of the execution, for otherwise the authority of the attorney would be nullified (*a*). If the principal is alive, an affidavit to that effect ought to be made; but a still more eligible plan is for the principal himself to sign a memoradum, according to some such form as the one given hereafter, in testimony of the fact (*b*). The authority, too, under which the deed was executed, ought to be delivered to the purchaser (*c*); or, if that cannot be done, there should be an attested copy of the instrument, and a covenant to produce the original.

XIV. Assuming, then, according to above analysis, that Nicholas Stiles was seised in fee of the estate devised, and that his will was duly executed, the next thing to be ascertained is his *death*, for during his life the devise is of course inoperative. The fact, however, that the will was *proved*, renders any further evidence of the testator's death unnecessary; and even if no probate had been obtained, yet, from the lapse of time, and subsequent dealing with the property, it is morally impossible for the testator to be still alive. If the will were of modern date, then it would be necessary to require some evidence of the testator's death, and the most appropriate for such a purpose is a certificate of burial, accompanied with an affidavit of identity; though, if the will has been proved, the production of the probate is commonly admitted to be sufficient. The estate, it will be observed, was

(*a*) See Book II. ch. viii. (*b*) See Book II. ch. viii.
(*c*) See 6 Sim. 519.

devised to John Stiles, with remainder to his first and other sons, successively, in tail male; and, as Richard claimed to be heir in tail, and subsequently joined with his father in suffering a recovery for the purpose of barring the estate tail, and creating new limitations (on the valid creation of which the title depends), it is necessary to prove that Richard was, in fact, the person on whom the entail devolved *per formam doni*, and competent to convey. It must be shewn, then, first, that he was the *son*, i. e. the legitimate son, of John Stiles; secondly, that he was the *only* son, or, if he had a brother, that he was the *first* son, or else that his elder brother died an infant, leaving him the only *surviving* son; and thirdly, that in 1781, *i. e.* when the recovery was suffered, he had attained his majority. If these particulars are substantiated by sufficient evidence, (Vide Ch. III. § 1.) and the recovery was duly suffered, the title, so far, may be considered as established.

XV. By referring to the analysis it will be seen, that, subject to a joint power of appointment, the estate stood limited to John Stiles for life, with remainder to his son in fee. During the lifetime of the father three several mortgages for terms of years were made to different persons, by force of the joint power of appointment. The son died in the lifetime of his father, intestate, leaving issue, viz. four daughters, who accordingly acquired the inheritance as coparceners, subject to the life interest of their grandfather, and the incumbrances created by him and his son. The grandfather afterwards died, upon which his estate de-

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termined. All these particulars, however, must be established by sufficient evidence. To prove the death of the grandfather, *i. e.* John Stiles, a certificate of his burial ought to be produced. The death and intestacy of the son, *i. e.* Richard Stiles, ought also to be proved; if no will was made, then the production of the letters of administration should be required, but, if any will exists, it must be produced (or evidence given of its contents), in order to shew that it does not operate on the estate in question; and this is requisite even although the possession has been conformable to the alleged fact of intestacy (*a*). If there be neither probate nor letters of administration, the death of Richard ought to be proved by the production of the certificate of his burial. And if it be alleged that no will was made, and that letters of administration were not taken out, because the intestate left no personal property, it is the duty of the conveyancer to suggest the expediency of searching for a will in the ecclesiastical courts of the several ordinaries, to whom the right of granting the administration of assets (if any) would have belonged, viz. the prerogative court, the court of the diocesan, and of the archdeacon, or other

(*a*) *Stevens* v. *Guppy*, 2 Sim. & Stu. 439. "In one instance," says Mr. Preston, "the lands had been held for eighty years by the same person; and after great reluctance the will of her brother was produced; and, though it had been alleged that he had died intestate, it turned out that the present owner was tenant in tail under his will. These and the like instances suggest cautions which often subject the conveyancer to the imputation of giving unnecessary trouble, and of being the author of delay and expense!" Prest. Abs. ii. 456.

person having local or peculiar jurisdiction (*a*). To obtain letters of administration for the very purpose of proving an intestacy would (as Mr. Preston remarks) be of no use, except to induce the belief of it from the oath which is taken; and an ordinary affidavit would equally answer that end.

XVI. Admitting the intestacy of Richard Stiles, the heirship of Mary, Jane, Emma, and Joanna, ought to be established. It must be shewn, then, that they are the only legitimate children of Richard Stiles, or, if he had any other children, that they all died in infancy, without issue. To prove, or rather to raise a rational presumption, that the individuals in question are, in fact, the legitimate children of the intestate, the marriage certificate of the parents, and the respective baptismal certificates of the children ought to be produced, accompanied with an affidavit, identifying the parties. And to prove that they are the only children, or only surviving children, (the others having died in infancy, without issue,) there should be an affidavit to that effect by some one well acquainted with the family, accompanied with burial certificates, and such other corroborative documents as can be adduced. And as *nemo est hæres viventis* (*b*), the death of the ancestor, *i. e.* Richard Stiles, ought to be proved by a certificate of his burial. (Vide Ch. III. § 1.) The four daughters of Richard Stiles, being his only issue, they take the inheritance, as before remarked, as coparceners; though several persons, they form

(*a*) Prest. Abs. ii. 454. (*b*) Co. Litt. 8. b.

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but one heir; each has a several freehold in the estate for all purposes of alienation and descent (*a*). Accordingly, the entire inheritance must now be treated as divided into four shares, and the title to each share ought to be considered apart from the rest.

Mary's Share.

1. Mary, one of the four coparceners, married Richard Edge, and afterwards died, leaving issue one son (Thomas) and her husband surviving. Having survived his wife, and had issue born alive, capable of inheriting the estate, Richard Edge became entitled to hold it for his life, as tenant by the curtesy of England (*b*), and subject to this life interest, the inheritance descended upon Thomas Edge as heir-at-law. He having married, his wife acquired an inchoate right of dower, *i. e.* in the event of her surviving, a right to hold for her life one third part in value of the estate (*c*). Assuming, then, the heirship of Thomas Edge to be established (it is unnecessary again to mention the evidence to be adduced for such a purpose), it is obvious, that, so long as his wife lives, he alone cannot convey the inheritance, otherwise than as subject to an inchoate right of dower. If a settlement, however, was made upon the marriage, and the wife, being of competent age to consent (*d*), agreed to accept the provision made for her in lieu of dower,

(*a*) Co. Litt. 164. a. "They are called Parceners," says Littleton, "because by the writ, which is called *breve de partitione facienda*, the law will constrain them, that partition shall be made among them." § 241. This writ of partition was abolished by the 3 & 4 Will. IV. c. 27, § 36. On the subject of Partition generally, see Book III. ch. iv. of this Essay.

(*b*) Litt. § 35, 52.

(*c*) Litt. § 36.

(*d*) See Book III. ch. vi.

then the fee might be conveyed absolutely. But a purchaser would be entitled to an attested copy of the settlement with a covenant for the production of the original; for, if a claim of dower were afterwards set up, he must not only shew that the wife had made some contract on the subject of her dower, but must prove the contents of that contract, in order to entitle himself to the protection of a court of equity (*a*). And here it may be remarked, that, if an outstanding term, created before the marriage and covering the estate (vide Analysis, C.) were got in and assigned to a trustee for the purchaser, this, too, would operate as an effectual bar of dower (*b*). In the case in question, however, the wife extinguished her right by levying a fine, and concurred in limiting the estate, *i. e.* one fourth part of the inheritance, to such uses as Thomas Edge, the husband, should appoint (so as to prevent any right of dower from again attaching), with remainder to him in fee. He then mortgaged the estate for two thousand years; and, the mortgagee having died, probate of his will was obtained by his executor. Afterwards Thomas Edge became a bankrupt, and, as stated in the Analysis, his property was conveyed by the commissioners to his assignees. This, it will be observed, took place before the statute 1 & 2 Will. IV. c. 56, which enacts (ss. 25 & 26,) that all the real and personal estate of the bankrupt which might have been assign-

(*a*) *Power* v. *Shiel*, 1 Beatt. 48.

(*b*) *Mole* v. *Smith*, 1 Jac. & W. 665; Jac. 490. The alterations in the law of dower effected by the 3 & 4 Will. IV. c. 105, will be noticed hereafter.

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ed or conveyed by the commissioners shall be absolutely vested in and transferred to the assignees by *virtue of their appointment*, without any deed of assignment or conveyance for that purpose. With reference to proceedings in bankruptcy, it is important to ascertain that the provisions of the 6 Geo. IV. c. 16, s. 96, and the 1 & 2 Will. IV. c. 56, s. 27, have been duly complied with (*a*).

Jane's Share.

XVII. 2. According to the Analysis, Jane died intestate and without issue, upon which her share descended upon her nephew, Thomas Edge, and her two sisters, Emma and Joanna. Thomas Edge having become bankrupt, his one-third part vested in his assignees. To raise the presumption of Jane's intestacy (and of her death) the letters of administration granted to her personal representative ought to be produced.

Emma's Share.

3. With respect to Emma's original share, *that*, it will be observed, was, upon her marriage with Lawrence Hogg, strictly settled: successive life estates being

(*a*) By 6 Geo. IV. c. 16, s. 96, no commission, adjudication of the commissioners, assignment, or certificate, shall be received as evidence, unless the same shall have been first entered of record. On the production in evidence of any instrument so directed to be entered of record, having the officer's certificate of entry upon it, and purporting to be signed by him, it shall be received as evidence of such instrument having been entered of record, without any proof of the officer's signature. And by 1 & 2 Will. IV. c. 56, s. 27, it is provided that in every case where the conveyance of the property of a bankrupt would require to be registered, enrolled, or recorded, the certificate of the appointment of assignees shall be registered, &c.

given to the husband and wife, with remainder to their first and other sons in tail male, with remainder to daughters in tail, &c. As to the one-third part of the share originally belonging to her sister Mary, and which she acquired by descent, *that* was conveyed by fine (the mode of assurance then proper for such a purpose) to the use of her husband in fee. Both husband and wife afterwards died (the former intestate) leaving issue, three children only, viz. Anna, Jane, and Margaret. Now, in order to establish a title to the share comprised in the settlement, and to the one-third part of Emma's share conveyed to Lawrence Hogg in fee, it is necessary that these three coparceners should shew not only that they are the heir of Lawrence Hogg, but also the heir *per formam doni, i.e.* designated by the settlement; for although, in the present case, the two classes of heirs are identical, yet this, it is obvious, does not universally happen. Assuming the heirship to be proved (vide Art. XVI); the next thing to be considered is the conveyance of 1830—I say "conveyance," for the lease and release, and fine, though three distinct instruments, constitute, properly speaking, *one* assurance only:—it is by their combined operation that the fee simple is conveyed. This observation, however, must be confined to the *entailed* estate; for the one-third which the daughters took as coparceners, would be effectually aliened, independently of the fine with proclamations. By referring to the analysis, it will be seen, that the conveyance was made "unto and to the use of A. B. and his heirs, in trust for C. D. and his heirs." As a use cannot be limited upon a use,

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the former takes the legal estate in fee, in trust for the latter, who has the equitable, *i. e.* beneficial, ownership. By his will A. B. expressly devised his trust estate, and accordingly the devisee becomes a trustee of the legal estate for the heir of C. D., who died intestate. To point out the evidence applicable to this state of circumstances, would lead only to a tedious repetition of what has been said already. It may be useful, however, to remark, that, where there is no *express* devise of trust estates, a question often arises whether such estates pass by the will, or descend to the testator's heir-at-law. If there be a general devise, *i. e.* a devise neither expressly including nor expressly excluding the estate in question, and the will and purposes of the devise do not negative such a construction, the trust estates will pass (*a*). "The rule," says Lord Eldon, "is not, that in every case, where general words are used, the property shall or shall not pass; but that, in each case, you must look at every part of the will for the intention with regard to such property."

Joanna's Share.

4. With respect to Joanna's interest, it will be observed that she mortgaged her original fourth part for a term of years; but did not incumber the one-third which she inherited as parcener.

Deduction of title to terms of years.

XVIII. Having thus traced successively the title to each share so as to shew the existing state of ownership, it is now necessary to recur to the three

(*a*) *Lord Braybrooke* v. *Inskip*, 8 Ves. 417, 435; and the cases cited by the Lord Chancellor.

terms originally created by John Stiles and his son, pursuant to the joint power in the conveyance of 1781. The first term, it will be observed, was created by way of mortgage to Richard Fox, who afterwards assigned it to James Crowe, and he too assigned it to Richard Elliott. In 1789, Elliott made his will, appointing Richard Crisp his executor, who upon the testator's death obtained probate; and, having received payment of the mortgage money and interest, assigned the term to Richard Dyne, in trust to attend the reversion and inheritance. As the subject of proving wills, and taking out administrations in cases of terms of years, is treated of in a subsequent part of this Essay, (vide Book III. Ch. VII.) it is only necessary to remark in this place, that care should be taken that the will was proved in a court of *competent* jurisdiction; for, although an executor derives his authority from the will, and may assign a term (and indeed do most other acts incident to his office) *before* probate, yet his *right* to make such an assignment cannot be *proved* otherwise than by adducing the probate, and establishing its validity (*a*). An administrator, however, cannot it seems make a valid assignment before letters, because, until administration be granted to him, he is in fact *not* administrator, and has no interest in the intestate's estate (*b*). Still there are some analogous cases in the books, which leave it open to contend that letters of administration when granted, have relation back to the death

(*a*) Prest. Abs. i. 185, 187; iii. 146; Will. Ex. i. 161.

(*b*) Prest. Abs. ubi sup.

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of the intestate, so as to legalise all such intermediate acts of the administrator, as would have been originally valid had he at the time been properly invested with that character.

The second term, too, it will be observed, was created by way of mortgage to Thomas Rich, who afterwards assigned it to Hunt: he having died intestate, it became necessary, in order to carry on the representation, that letters should be obtained by the person (or persons) entitled under the statutes 31 Edw. III. Stat. 1, c. 11, and 21 Hen. VIII. c. 5, s. 3; who, in the case in question, was the widow of the deceased. The mortgage having been discharged, she then assigned the term to John Pinsent in trust to attend the reversion and inheritance. According to the Analysis, Pinsent died intestate; and hence it is necessary, before the term can be assigned, for the person entitled to administration to take out letters.

The third term was in like manner created by way of mortgage to Brent, who died intestate; and his administrator having obtained letters, assigned to Richard Kenchant, who died *testate*, appointing three executors, to whom probate was granted. Two of the executors died in the lifetime of the other executor, and the survivor, having made a will appointing two executors, also died. One of his executors survived the other, and died intestate. Now, it is to be remarked, that, as the several executors of Kenchant *all* proved, the interest devolved, after the deaths of the other two, upon the surviving executor. But, supposing the surviving executor had renounced

the probate, and died without proving, the representation as to the term in question could not have been transmitted to his executors; for, although the right to the executorship would have survived to him, notwithstanding any previous renunciation, yet not having obtained probate, his death would have created an intestacy; and, under such circumstances, administration *de bonis non* must be obtained (*a*). If all the executors had died without having proved the will, then it would have become necessary to take out letters *cum testamento annexo* (*b*). In the case in question, however, all proved; but as it is alleged that E. F. *survived* the other two executors, the fact of his survivorship should be shewn by certificates of burial of his co-executors, before his death (*c*). Upon the death of the surviving executor of E. F. intestate, it became necessary, for the reasons above mentioned, to take out letters of administration *de bonis non;* and the administrator having obtained payment of the mortgage money and interest, assigned the term to X. Y., in trust to attend the reversion and inheritance.

Identity of parcels.

XIX. There is one point, not before adverted to, which ought to be noticed in this place, as it particularly demands the attention of the conveyancer :— I mean the *identity of parcels.* The form of Assurance may be appropriate—the parties competent to convey—the consideration adequate—the operative

(*a*) Prest. Abs. i. 185; Will. Ex. i. b. v., c. 3, § 2.

(*b*) Will. Ex. ubi sup.

(*c*) Prest. Abs. i. 185.

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words technically correct—the property rightly limited—the instrument duly executed: and yet, if the subject-matter of contract cannot be identified with the subject-matter of the Abstract, through each successive instrument, the Title is not such as a purchaser can be compelled to take. It often happens, indeed, that, from the imposition of new names, from confusion of boundaries, and from various other circumstances which may be easily conceived, the actual state of the property does not correspond with its former state as described in the earlier deeds. When this is the case, recourse must be had to collateral evidence to shew, that though the description is not identical, the thing described is the same, (vide Ch. III. § 2). "When," says Mr. Preston, "it becomes a question of parcel or not, namely, whether a particular close is parcel of a farm; or whether among lands which lie intermixed, a parcel of ground is freehold, or copyhold, or leasehold, and consequently whether it has devolved to one person or to another; or where there has been one entire occupation by a tenant, holding under different lessors, and consequently it becomes doubtful, whether it be parcel of one farm or of the other, this question leads to an investigation on which a *jury* is alone competent to decide. Titles of this description frequently depend so essentially on facts not correctly ascertained, and which may be materially varied by parol evidence, that no one, except a willing purchaser, can, unless the right to the possession has been established by lapse of time, be advised to concern him-

self with property depending on a title so disputable" (*a*).

Principal circumstances to be attended to in drawing conclusions as to the Title.

XX. It remains to observe, that in drawing conclusions as to the Title, the principal circumstances to be attended to are (*b*):

"1st. That there is a deduction of title to the legal estate;

"2dly. That the legal estate can be obtained free from any equities affecting it;

"3dly. That all the particular estates either are determined, or can be conveyed to the purchaser or his trustee;

"4thly. That no reversion or remainder is outstanding in the Crown, or in any stranger; and

"5thly. That there are not any incumbrances by way of condition or limitation over, mortgage, crown-debts, judgments, statutes, decrees, lis pendens, annuities, rents, legacies, portions, charges, dower, curtesy, bankruptcies, forfeitures, leases, &c., or any outstanding term of years which the purchaser cannot procure, either to be extinguished or assigned."

And it may be added, that it is the duty of counsel to suggest such objections and inquiries as are likely to be raised, even by *strict* practitioners, on any future ale or mortgage. He ought to do this, not only for the security of his client, but in order that the expense of proving the Title may be borne by the proper person, viz. the vendor, and not as might

(*a*) Prest. Abs. iii. 33; and see p. 215.
(*b*) Prest. Abs. iii. 230.

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otherwise happen, at some future period, by the purchaser himself, under the disadvantage too of loss of evidence occasioned by the lapse of time (*a*). A variety of circumstances, indeed, of which the purchaser's solicitor can alone be adequately informed, will often call for the exercise of a sound discretion on his part as to enforcing or withdrawing such objections and inquiries; but it is not on that account less the duty of counsel to make them. If he approve of the Title, this does not preclude the person consulting him from taking any reasonable objections that may be afterwards suggested (*b*); nor on the other hand, will the disapproval of counsel be binding on the vendor; for (as will appear in the next chapter), the doubts of conveyancers or of any private individual are not alone sufficient to render a title unmarketable.

Whether questions of title should be raised when settling draft conveyance, though not instructed to advise on title.

XXI. And here it may be remarked, that a question sometimes arises in practice, whether, in settling a conveyance, it is the duty of counsel to raise objections of title occurring on the draft, by marginal observations or otherwise, although not instructed to advise as to the Title; and generally speaking, he ought not. The rule, however, is stated to be this, viz. "If the facts disclosed by the draft shew a *patent* defect of title, it is the duty of counsel, implied in the very act of settling the draft, to point it out, and call for the addition of parties or otherwise as the case requires;

(*a*) See Prest. Abs. i. 268.
(*b*) 18 Ves. 514; Sugd. Vend. & Pur. i. 331.

but, if the facts stated do not themselves shew a defect, he ought not to object on the draft that the title shewn is only a primâ facie title, and suggest inquiries, which would, in fact, lead to an investigation of the title."

Lien of conveyancer.

XXII. In concluding these general observations on the duty of counsel, it may be worth while to remark, that, although a barrister has no *legal* right to his fees (*a*), and therefore cannot claim any lien for them upon the papers laid before him; yet it is otherwise with the *certificated* conveyancer who is not a barrister, (and the same observation is equally applicable to special pleaders); for *he* is not supposed to act with the view to an honorary reward only, but in order to obtain a reasonable compensation for his labours; and, accordingly, he has a right of lien, and may retain the papers until his fees have been paid (*b*). His lien, however, unlike that of an attorney or solicitor, is not a general one, (for such liens depend upon custom or special contract, and no such custom exists as to conveyancers or special pleaders), and he can retain, therefore, only the particular papers in respect of which the fees are due (*c*). If given up without payment, his lien is lost; and when they again come into his

(*a*) Davys's Pref.; Bla. Com. iii. 28; 2 Atk. 332. See Notes and Illustrations (D).

(*b*) *Poucher* v. *Norman*, 3 Barn. & Cr. 744; 5 Dowl. & Ryl. 648; *Davis* v. *Sibley*, 6 Dowl. & Ryl. 4. The contrary opinion at one time obtained: *Jenkins* v. *Slade*, 1 Car. & P. 270; 4 Taunt. 808.

(*c*) See *Hollis* v. *Claridge*, 4 Taunt. 807.

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possession, although in respect of the same transaction as before, yet he can retain them only for the fees payable by reason of such additional labour (*a*). The lien of a solicitor or attorney, as before observed, is a general one (*b*); but this does not seem to extend to the will of a deceased testator (*c*): at least the ecclesiastical court can order it to be brought in, though in the custody of an attorney claiming a lien, and the court of King's Bench will not interfere by prohibition (*d*).

(*a*) *Sweet* v. *Pym*, 1 East, 5.

(*b*) See *Stevenson* v. *Blakelock*, 1 M. & S. 535; 5 Barn. & Adol. 813.

(*c*) *Georges* v. *Georges*, 18 Ves. 294; *Balch* v. *Symes*, Turn. & R. 87, 92.

(*d*) *Ex parte Law*, 2 Ad. & Ell. 45; 4 Nev. & M. 7.

CHAPTER II.

OF THE TITLE TO BE DEDUCED.

SECTION 1.

Of the Right to and Nature of a Good Title.

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Right to a good Title.

I. WHOEVER proposes an estate for sale without qualification, asserts, in fact, that it is his to sell; and, consequently, that he has a good title (*a*). Hence

(*a*) 4 Madd. 365; 5 Ves. 734; 18 Ves. 512. For a definition of the term "title," see Intro. § 1, art. 3, note. "There is a marked distinction," said Lord Erskine, "between a real estate and a personal chattel. The latter is held by *possession;* a real estate by *title.* Possession of an estate is not even *primâ facie* title. It may be by lease, or only from year to year." "I repeat," added his lordship, "that land is held, not by possession, but by title:—not so as to personal chattels, for the common traffic of the world could not go on. Therefore, a sale in market overt changes the property of a chattel; and that rule, that possession is the criterion of title to a chattel, has been adopted in the bankrupt acts; so that, if the owner has permitted the bankrupt to be the visible proprietor, the property is divested; for no one can distinguish the property, except by the possession. But that is not so as to land; for no person in his senses would take an offer of a purchase from a man, merely because he stood upon the ground. It is not even *primâ facie* evidence. He may be tenant by sufferance, or a trespasser. A purchaser must look to his title; and if, being asked for the deeds, the vendor acknow-

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a purchaser may insist on the production of a good title as a matter of right—not growing out of any express stipulation of the parties, but implied in the act of agreement itself (*a*). He may, indeed, waive this right either expressly or by implication, or the vendor may stipulate that such a title only as he happens to have shall be accepted (*b*). But otherwise a good title must be produced, or the vendor cannot enforce performance of the contract.

Nature of a good Title.

II. Thus far the law is clear. But the question is, (and it is one continually arising), what is a good title? At law every title is considered to be either good or bad (*c*); and such was once the doctrine in equity. According to the old practice, and until about Lord Somers's time, the Court of Chancery would not entertain a bill for specific performance, unless the party seeking it had first sustained his title by a verdict at law (*d*). Afterwards the equity judges took upon themselves to decide the

ledges he has not got them, the purchaser is bound to further inquiry." 13 Ves. 119, 122. And in *Boydell* v. *M'Michael*, Mr. Baron Parke observed, that, "with regard to real property, the possession is considered as nothing, but the title only is looked to." 1 Cr. Mees. & R. 179; and see *Laythoarpe* v. *Bryant*, 1 Bing. N. C. 420; 1 Scott, 327. As to sales of personal chattels in market overt, see *Peer* v. *Humphrey*, 2 Ad. & Ell. 495; *Horwood* v. *mith*, 2 T. R. 750.

(*a*) *Ogilvie* v. *Foljambe*, 3 Meriv. 64; 1 Mees. & Wels. 701.

(*b*) *Freme* v. *Wright*, 4 Madd. 364; *Wilmot* v. *Wilkinson*, 6 Barn. & Cr. 506.

(*c*) *Romilly* v. *James*, 6 Taunt. 274; *Boyman* v. *Gutch*, 7 Bing. 379, 5 M. & P. 222, overruling *Curling* v. *Shuttleworth*, 6 Bing. 134; 3 M. & P. 368.

(*d*) 1 You. & Coll. 228; Ambl. 406; Fonbl. Treat. of Eq. i. 139; Vin. Abr. tit. Contract (M), pl. 2, 11, 15, 24.

question of title, whether it was good or bad; but, in assuming this function, which properly belonged to the courts of law, they had plainly undertaken an office for which they were but imperfectly qualified; having no adequate means of sifting the title, and no jurisdiction to bind other than those who are parties to the suit; so that any question of title could not be conclusively settled by decree (*a*). Cases soon arose clouded with so much doubt, either as to matters of fact or matters of law, that the Court hesitated, under such circumstances, to decree specific performance. Hence the origin of what are called *doubtful* titles. And certainly it would have been repugnant to every just principle to compel a purchaser to pay for what he might never get; to enforce a contract when all mutuality was destroyed. Accordingly, it is laid down by Lord Eldon as an established rule of equity, that, "although in the judgment of the Court, the better opinion is, that a title can be made, yet if there is a considerable, a rational doubt, the Court does not attach so much credit to its own opinion as to compel a purchaser to take the title, but leaves the parties to law (*b*)". In other words,

Origin of Doubtful Titles.

(*a*) Bla. Com. iii. 442; 4 Bro. C. C. 86; 1 Ves. jun. 566.

(*b*) 16 Ves. 274; and see 11 Ves. 464; 1 Jac. & W. 569. "The law of this court," said Lord Eldon, "has altered within my time. When I first began to practice, the rule was this: when the Court had once determined that a party was tenant in tail, or tenant for life, with an absolute power of appointment, or any thing else that would enable him to convey a fee simple free from all charges and incumbrances whatsoever, it would act upon that opinion as incontrovertibly right. The old course used to be, when a party was dissatisfied with the judgment of the court, to compel

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a Court of equity will not compel the acceptance of a title where there is a reasonable doubt either in law or in fact (*a*).

III. "It is not easy," says an able and learned writer, (Mr. T. Batty Addison), "to find fault with the rule, that a purchaser shall not be compelled to pay money certainly his own for property to which the vendor's title is doubtful; yet the doubt should be a reasonable one, and the rule should be confined to cases where there is some doubt upon a question of fact. When questions of law," he adds, "are brought before a Court, they should be decided, and cease to be doubtful." If the doubt arise from some uncertainty in the law itself, as in the case of *Blosse* v. *Clanmorris*, which will be presently noticed, then certainly it is desirable that the question should be

him either to do as the Court required, or to appeal to the House of Lords;—not that that opinion was decisive, but it gave a sanction to the title, which would probably operate to the security of the purchaser. And I believe that the first case, in which that rule was departed from, was that of *Shapland* v. *Smith*, 1 Bro. C. C. 75; and that the last case was one in which Mr. Morris, a king's counsel, was plaintiff. The Court, since that time, has almost gone the length of saying, that, unless it was so confident, that if it had 95,000*l.* to lay out on such an occasion, it would not hesitate to trust its money on the title, it will not compel a purchaser to take it." 1 Jac. & W. 569; and see 11 Ves. 465; 16 Ves. 274. It is justly observed, however, by Sir William Grant, in *Sloper* v. *Fish*, 2 Ves. & B. 149, that the rule of not compelling a purchaser to take a doubtful title, was not first introduced by Lord Thurlow, but is at least as old as Sir Joseph Jekyll's time, and was repeatedly acted upon by Lord Hardwicke.

(*a*) *Per* Sir John Leach, 6 Madd. 57.

finally settled, either by the legislature, or the supreme court of appeal. But if it originate in the difficulty of *applying* some acknowledged rule of law, it would be most unjust to confer upon any Court the power of binding conclusively the interests of persons not before the Court, and who, therefore, could have no opportunity of advocating their claims. Besides, if such a power did exist, it would operate as a direct encouragement to litigation; for (not to mention cases of collusion) purchasers would then set up groundless objections for the very purpose of obtaining a decree *against themselves*, which, on this supposition, would amount to a warranty of Title.

Classification of doubtful titles.

IV. There are at least three species of doubtful titles: 1st, where the title is doubtful by reason of some uncertainty in the law itself; 2ndly, where the doubt is as to the application of some settled principle, or rule of law; and, 3rdly, where the matter of fact upon which a title depends is either not in its nature capable of satisfactory proof, or, being capable of such proof, is yet not satisfactorily proved (*a*).

(*a*) See 5 Madd. 372; 6 Madd. 57. In *Howarth* v. *Smith*, 6 Sim. 166, there is a very elaborate argument (reported by the learned counsel himself) on the doctrine of doubtful titles, in which the cases are classed under three general heads; comprehending in the first division those cases in which the *parties themselves* entertained a doubt respecting the existence of an alleged rule of law or equity, though, in the *opinion of the Court*, there was *no* doubt; in the second, those cases wherein the doubt related to the application of some general rule, the existence of which was admitted; and in the third division, those cases wherein the doubt was

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First species.

1st. In illustration of the first species of doubtful Titles, the case of *Blosse* v. *Clanmorris* (*a*) may be cited; the question being, whether a reversion, which had become forfeited to the Crown, could be barred by a recovery. "The law," said Lord Eldon, "as to estates tail, under the 34 Hen. 8, was clear and settled, but not so with respect to such a reversion as now was in question; and he could not advise the House, *sitting as a Court of equity in appeal*, to hold a purchaser to a contract, in a case where it could not be stated, as a matter free from doubt, whether the reversion had been barred by the re-

in regard to some matter of fact; apparently confining (and I think correctly), the two last classes to such cases only as the *Court* considered doubtful. In doing so, however, there is, I conceive, a total departure from the principle of classification adopted with regard to the first species of doubtful titles; for if the doubt of the parties themselves or their counsel, be alone sufficient to constitute a doubtful title, such a doubt may arise, not merely from some uncertainty in the law itself, but also from the difficulty of applying an admitted rule or principle, or from some question of fact. But to designate that a doubtful title, which is so only in the opinion of a private individual, is clearly wrong; for the doubt must be a *judicial* one; it must be doubtful, as Lord Eldon says, in the judgment of the Court. Such a title may certainly, in one sense, be called doubtful; but then we are employing a technical term, of known and settled signification, in a very loose and popular way, which, instead of clearing up the subject, must inevitably confuse it. The only correct classification seems to be that given by Sir John Leach, in *Emery* v. *Grocock*, 6 Madd. 57, and in *Smith* v. *Death*, 5 Madd. 372, viz. that titles are doubtful either in law or in fact; with this distinction, that the former may arise from some uncertainty in the law itself, or in its application.

(*a*) 3 Bli. 62; and see *Rose* v. *Calland*, 5 Ves. 186; *Slope* v. *Fish*, 2 Ves. & B. 145; *Price* v. *Strange*, 6 Madd. 159.

covery." Lord Redesdale, too, observed, "General opinion is certainly against the title. In this case it is not necessary to come to any precise decision on the point. It is sufficient, on the question now before the House, if the law be doubtful. A purchaser has a right to require a marketable title, and this title, it must be admitted, rests on a point of law, which is at least doubtful." SECTION 1.

2ndly. Of the second species of doubtful Titles the cases are very numerous (*a*); one of the earliest is *Marlow* v. *Smith*, which was decided by Sir Joseph Jekyll, M. R. In that instance the title depended on the construction of a will—whether certain words were sufficient to pass a trust estate. It was contended by the counsel, that, "if there was the least doubt of the title (which it was made to appear there was, by the opinion of Serjeant Cooper and Mr. Webb), it would by no means be proper for the Court to compel the party to accept the title; for, in such case, if the purchaser should be sued, where could he have recourse to for redress? it would be compelling him to buy a special verdict or a suit." In this argument the Master of the Rolls concurred: "There being," said he, "the opinions of learned men against the title, I will not, nor do I think it reasonable, Second species.

(*a*) *Marlow* v. *Smith*, 2 P. Wms. 198; *Shapland* v. *Smith*, 1 Bro. C. C. 75; *Heath* v. *Heath*, Ib. 147; *Cooper* v. *Denne*, 4 Bro. C. C. 80; S.C. 1 Ves. jun. 565; *Sheffield* v. *Lord Mulgrave*, 2 Ves. jun. 526; *Roake* v. *Kidd*, 5 Ves. 648; *Wheate* v. *Hall*, 17 Ves. 80; *Willcox* v. *Bellaers*, Turn. & R. 491; *Sharp* v. *Adcock*, 4 Russ. 374; *Price* v. *Strange*, 6 Madd. 159; *Brewster* v. *Angell*, 1 Jac. & W. 625; 2 You. & J. 623.

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that a Court of equity should compel the purchaser to accept the purchase." It must not, however, be inferred from this decision, (which went on other grounds besides the "opinions of learned men," for Sir Joseph Jekyll himself considered the title bad), that the doubts of conveyancers, or of any private individual, are alone sufficient to render a title doubtful: it must be doubtful (as Lord Eldon says) "in the judgment of the Court" (*a*). Indeed, if it were otherwise, where could we find a title that is not doubtful? And if the *Court* doubts, it matters not that the Master has reported the title good, or even that the Common Law Judges have certified in its favour (*b*). "The decree is mine," said Lord Nottingham, "and the oath that decree is made upon is mine—theirs is but learned advice and opinion (*c*)." Still, if there has been a decision in favour of the title, the Court, notwithstanding any doubt which it may itself entertain, will decree a specific performance (*d*).

Third species.

3rdly. In illustration of the third and last species of doubtful Titles, the case of *Lowes* v. *Lush* (*e*) may

(*a*) 16 Ves. 274; and see *Warneford* v. *Thompson*, 3 Ves. 515, and the argument of Sir Samuel Romilly and Mr. Bell, in *Moody* v. *Walters*, 16 Ves. 293.

(*b*) *Sheffield* v. *Lord Mulgrave*, 2 Ves. jun. 526.

(*c*) *Duke of Norfolk's case*, 3 Ch. Cases, 39; and see Introd. § 2, art. 10, p. 17.

(*d*) *Biscoe* v. *Wilks*, 3 Meriv. 456; *Rushton* v. *Craven*, 12 Pri. 599.

(*e*) 14 Ves. 547; and see *Pott* v. *Turner*, 4 M. & P. 551; *Cann* v. *Cann*, 1 Sim. & Stu. 284; *Curtis* v. *Blow*, 2 Barn. & Adol. 426; *Emery* v. *Grocock*, 6 Madd. 57; *Cooke* v. *Soltau*, 2 Sim. & Stu. 163; *Mitchel* v. *Neale*, 2 Ves. sen. 678; *Noel* v. *Weston*, 6 Madd. 50; *Hartley* v. *Smith*, 1 Buck, 368; *Barnwell* v. *Harris*, 1 Taunt. 430; *Pierce* v. *Scott*, 1 You. & Coll. 257, 260.

be cited; for there it was held, that, an act of bankruptcy having been committed, a purchaser was not bound to take a title depending on the fact that there were no debts by reason of which a commission could issue—a fact, in its nature, not capable of satisfactory proof. So, where a title depended on the question, whether a testator had the entirety of a particular estate, the only evidence in favour of the fact consisting of extrinsic circumstances, the Court held that this was not sufficient proof, and that (to adopt a forensic metaphor), it cast a cloud upon the title (*a*). "The doubt," said Lord Eldon, "in general cases has been, not of the same nature as this, but upon matter of law respecting the title; yet, if there is as rational a doubt, whether, in this instance, the testator had the entirety of the premises, as if the title was affected by an objection of law, I cannot see the ground for a different principle." And Sir John Leach has observed (*b*), that, "in matter of fact, there is doubt where the testimony is direct, because it may be given malâ fide; or if bonâ fide by mistake: there is still more doubt where matter rests in presumption, for all presumptions may be answered. In assuming the jurisdiction of a specific performance, Courts of equity," he adds, "are compelled to grapple with these difficulties; and the only rule that they can adopt seems to be, that, if the case be such, that, sitting before a jury, it would be the duty of a judge to give a clear direction in favour of the

(*a*) *Stapylton* v. *Scott*, 16 Ves. 272; and see *Hartley* v. *Smith*, ut. sup.

(*b*) *Emery* v. *Grocock*, ut sup.

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fact, then it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser."

Nature of a good Title.

V. From what has been premised it is abundantly evident, that, in the contemplation of equity, a Title is not good which is doubtful. It is equally well established, that a purchaser cannot be compelled to take an estate to which an equitable title only is shewn (*a*), unless, indeed, he buy under a decree of the Court, for then the right of the party having the legal estate becomes bound, and he will not be permitted to employ it for his own advantage (*b*). And yet, if the person purchasing under a decree sells the estate again, he cannot compel the acceptance of the same equitable title which the Court obliged him to take, but must deduce a title, not only to the equitable, but to the legal ownership (*c*). It may, indeed, be stated generally, that a good title is produced whenever it appears, that, upon certain acts done, the legal and equitable estates in the property contracted for will become vested in the purchaser, those acts being such as the vendor can either himself perform, or cause to be performed (*d*). Hence,

(*a*) *Abel* v. *Heathcote*, 2 Ves. jun. 100; *King* v. *Turner*, 2 Sim. 549.

(*b*) *Powell* v. *Powell*, 6 Madd. 53; Sugd. Vend. & Pur. i. 350; Prest. Abs. iii. 402, citing *Wyatt* v. *Delme*.

(*c*) Sugd. Vend. & Pur. i. 349.

(*d*) *Braybrooke* v. *Inskip*, 8 Ves. 436; *Berkeley* v. *Daugh*, 16 Ves. 380; *Lewin* v. *Guest*, 1 Russ. 325.

the rule laid down by Sir John Leach, with the concurrence of Lord Eldon, that, "where a necessary party to the title is neither in law nor equity under the control of the vendor, but has an independent interest, unless there is produced to the Master a legal or equitable obligation on the part of the stranger to join in the sale, the Master ought to report against the title; otherwise, where a necessary party to the title is under the legal or equitable control of the vendor, as a mortgagee, there the Master may well report, that, upon payment of the mortgage, a good title can be made (*a*)." Accordingly, if the abstract disclose any incumbrances, such as annuities, judgments, or the like, which the vendor can cause to be discharged, or an outstanding term, of which he can obtain an assignment, (but not otherwise), these are, technically speaking, not matters of title, but matters of conveyance only (*b*).

Matters of conveyance distinguished from matters of title.

(*a*) *Esdaile* v. *Stephenson*, 6 Madd. 366.

(*b*) *Berkeley* v. *Daugh*, 16 Ves. 380; *Townsend* v. *Champernown*, 1 You. & Jer. 538. "The strict rule," says Sir Edw. Sugden, "seems to be, that the vendor must procure the fee to be vested, either in himself, or a trustee for him; and that a purchaser is not compellable to bear the expense of a long conveyance, on account of the legal estate having been outstanding for a length of time, or of the estate being subject to incumbrances which are to be paid off. It is not, however," he adds, "very usual to insist upon this, unless the title cannot be perfected without a private act of parliament; in which case, the expense of obtaining it is always borne by the vendor." Sugd. Vend. & Pur. i. 449. From an opinion given by the late Mr. Butler, it appears that he did not think it clear, that a purchaser can insist upon incumbrances being discharged, and the fee absolutely vested in the vendor before the conveyance to him. "I rather think," said he, "that the vendor

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Indemnity and compensation.

VI. In some cases, however, specific performance will be decreed, although the vendor cannot convey the whole of the property contracted for, or can convey it only, subject to some defect of title: in the one case, an adequate abatement from the purchase money must be made, and an indemnity given in the other; *i. e.* not such an indemnity as will amount only to a compensation for the value in case of eviction, but such as will effectually protect the purchaser in the possession of the *specific subject* of his contract (*a*). The general rule, however, is, that the Court can neither compel a purchaser to

may insist upon the incumbrancers being parties to the conveyance; but, this being for the convenience of the vendor, the purchaser may expect that the extra expense occasioned by it should be paid by the vendor. In the extra expense, the increase in the size of the deed, and the costs attending its execution by the incumbrancers, and the approbation of it by the lawyers, must be included." On the other hand, Mr. Shadwell conceived, when advising on the same case, that "the purchaser has a right to say, he will take his conveyance from none but the vendor, the owner of the estate, since he only contracted to sell to him. It remains, therefore," he adds, "for the vendor to consider, whether he will submit to allow a reasonable sum for the extra expense of the conveyance, occasioned by the addition of incumbrancers as parties; or whether he will, at his own expense and inconvenience, procure all the incumbrancers to release to himself, so as to make himself alone the proper party to convey to the purchaser."

(*a*) *Fildes* v. *Hooker*, 3 Madd. 193. From this, and the case of *Warren* v. *Richardson*, 1 You. 1, it is clear, that, where the estate contracted for is held with other property at one entire rent, or subject to covenants, with a proviso for re-entry on non-payment of the one or non-performance of the other, upon *any part* of the land, the title is unmarketable; unless, indeed, the reversioner release his right of re-entry, and then it becomes necessary to investigate *his* title.

take an indemnity, nor a vendor to give it (*a*). The doctrine as to abatement is also of limited operation, being confined to those cases only where the purchaser gets *substantially* that for which he bargains (*b*). This rule, though easily propounded, is very difficult to apply; for how are we to ascertain what it is that does constitute the *corpus* of the contract? (*c*) And here it may be remarked, (what is in fact a corollary from the foregoing rule), that, if two or more parcels are *complicated together* so as to make the contract *one, i. e.* intrinsically, (for to be so *formally* only is not sufficient), and the vendor fails to produce a good title to one parcel, the purchaser may repudiate the *whole* (*d*). "In

(*a*) *Balmanno* v. *Lumley*, 1 Ves. & B. 224; *Paton* v. *Brebner*, 1 Bli. 66; *Aylett* v. *Ashton*, 1 Myl. & Cr. 105; and see Sugd. Vend. & Pur. i. 304.

(*b*) *Fordyce* v. *Ford*, 4 Bro. C. C. 495; *Drewe* v. *Corp*, 9 Ves. 368; *Dyer* v. *Hargrave*, 10 Ves. 507; *Halsey* v. *Grant*, 13 Ves. 73; *Knatchbull* v. *Grueber*, 1 Madd. 153; *Smith* v. *Tolcher*, 4 Russ. 305. I ought to add, however, that *quit-rents* are matter of compensation, probably (as some suppose) because they are incidents of tenure. *Esdaile* v. *Stephenson*, 1 Sim. & Stu. 124.

(*c*) "There is no standard by which to ascertain what is essential to a purchaser. The motives for purchasing real property are very different in different persons. Tastes, opinions, ages, create different views. Some particularity, some whim may have induced him to purchase. What is desirable to one is not so to another: one wants a wood for game—another desires it only as a beautiful object; one looks only to agriculture—another dislikes tithes: it therefore seems a little arbitrary to insist on a party taking compensation." *Per* Sir Thomas Plumer, 1 Madd. 167.

(*d*) *Cassamajor* v. *Strode*, 2 Myl. & K. 725. "Cases, too," observed Lord Brougham, "might be supposed in which two transactions might be so complicated together, that when they were made the subject of contract in one, or even in two different in-

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determining," said Lord Brougham, in the case just referred to, "whether a purchaser, who fails to obtain a good title to one lot, shall be let off from his contract for another, the whole circumstances may be examined in order to prove that the two contracts are one, by shewing that the two parcels are complicated together, and that upon the whole transaction the Court will determine as a jury would, the question, did or did not the party purchase the one with reference to the other? would he or would he not have taken the one, had he not reckoned also upon having the other?" This "complication," it is obvious, may arise either from the express agreement of the parties, or from the nature of the properties—the one being essential to the enjoyment of the other—or from some other plain manifestation of intention (*b*).

Waiver of right to the production of a good title.

VII. In treating of the purchaser's right to the production of a good title, it was remarked, that this right may be waived either expressly or by implication. The inclination of the Court, however, being in favour of the purchaser's right, he who claims to

struments, a purchase by one party should not be binding, unless a sale to the vendor should also be completed. Where two estates were conterminous, or where there was a mixed use and enjoyment of the estates, as in the case of one of the parties having an easement over the property of the other, a contract depending upon such mutuality as to sale on one side and purchase upon the other might well exist." *Croome* v. *Lediard*, 2 Myl. & K. 260.

(*b*) *Knatchbull* v. *Grueber*, *Cassamajor* v. *Strode*, ut sup.; and see Sugd. Vend. & Pur. i. 291—294.

be excepted from the ordinary obligation is required to establish a clear case of exception; he must prove, from the facts of the case, that the purchaser intended to waive, and has actually waived, his right of examining the title (*a*). But, although the purchaser may have waived his right, yet this does not necessarily import that he will accept the title, though it should manifestly appear to be bad; and accordingly, where it came out collaterally before the Master, that a good title could not be given, the Court, notwithstanding it had already decided that the purchaser had by his conduct waived all right to an inquiry into the title, refused a decree for specific performance (*b*). It has also been held, that where a purchaser, having a right to a good title, gives a voluntary assurance, that, provided some particular objection be removed, he will accept the title, this does not, (if such objection still continues), create a legal obligation upon him to relinquish in all future proceedings his original right to a marketable title (*c*).

Common law doctrine of waiver.

VIII. These observations on the subject of waiver are made with more immediate reference to the

(*a*) *Burroughs* v. *Oakley*, 3 Swan. 168. For instances of *implied* waiver, see *Colton* v. *Wilson*, 3 P. Wms. 190; *Burnell* v. *Brown*, 1 Jac. & W. 168; *Margravine of Anspach* v. *Noel*, 1 Madd. 310; *Fleetwood* v. *Green*, 15 Ves. 594. When the *acts* of the purchaser are relied on as evidence of waiver, they ought to be such as, without waiver, would not have been performed. 3 Swan. 172.

(*b*) *Warren* v. *Richardson*, 1 You. 1.

(*c*) *Lesturgeon* v. *Martin*, 3 Myl. & K. 255.

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equitable doctrine of specific performance. "By the general rules of the common law, (to use the luminous language of the Court in *Goss* v. *Lord Nugent*)(*a*), if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or to subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. But the statute of frauds has made certain regulations as to contracts for the sale of lands; and by the 29 Car. 2, c. 3, s. 4, it is enacted, that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Effect of the statute of frauds on the common law doctrine of waiver.

(*a*) 5 Barn. & Ad. 65, 66.

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"It is to be observed," (continues the Court), "that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing. And as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing. But we think the object of the statute of frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by *writing only*." Accordingly, where, by an agreement in writing, one contracted to sell several lots of land, and to make a good title to them, and it was afterwards *verbally* agreed to waive the title as to one of the lots, the Court held that no action could be maintained; because the effect of such waiver was to substitute for the original contract a new one, to be proved not by "writing only," as required by the statute, but partly by matter in writing and partly by oral testimony (*a*).

Legal effect of verbal waiver of part of written agreement.

IX. With respect to relief in case of eviction for want of title, it may be remarked, that, although the purchase money has been paid, yet it may be re-

Relief where eviction takes place *before* conveyance.

(*a*) *Goss* v. *Lord Nugent*, 5 Barn. & Ad. 58.

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No relief *after* conveyance, unless protected by the covenants for title; or on the ground of fraudulent misrepresentation.

covered by the purchaser in an action for money had and received, (notwithstanding his having taken possession of the estate), if he be evicted *before* the execution of the conveyance. But where the eviction takes place *after* the execution of the conveyance, and by a title to which the covenants do not extend, the purchase money cannot be recovered, either at law or in equity (*a*). If, however, there has been a misrepresentation of material facts not within the view of the opposite party, and that misrepresentation is made knowingly, so as to form a case of deception, this is a good ground in any Court of equity to rescind the sale (*b*); and at law, an action may be maintained for the purpose of recovering damages occasioned by such misrepresentation (*c*), even if made by a third person having no personal interest in the contract (*d*). With respect to the case of a fraudulent misrepresentation made by a third person to one who is about to advance money upon the security of some specific fund or property, in regard to the state or value of such fund or porperty, an important question arises, whether this is a representation of the credit or ability of the owner so as to fall within the stat. 9 Geo. 4, c. 14, s. 6, (commonly called Lord Tenter-

(*a*) Sugd. Vend. & Pur. i. 554; Co. Litt. 384, n. by Butler.

(*b*) *Edwards* v. *M'Leay*, Coop. 308; *Small* v. *Attwood*, You. 462.

(*c*) *Per* Lord Lyndhurst, L. C. B., in *Small* v. *Attwood*, You. 461, citing *Eakins* v. *Treasham*, 1 Keb. 510; 1 Lev. 102; *Lisney* v. *Selby*, 2 Lord Raym. 1118; *Dobell* v. *Stevens*, 3 Barn. & Cr. 623.

(*d*) Sugd. Vend. & Pur. i. 5.

den's act), by which it is enacted, that "no action shall be brought whereby to charge any person by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain money, credit, or goods *upon* (*a*), unless such representation or assurance be made in writing, signed by the party to be charged therewith." The sound construction, and the one sup-

No action can be brought by reason of any representation, relating to the trustworthiness of a third person, made with the intent that he may obtain *personal* credit, unless in writing, signed by the party to be charged. 9 Geo. 4, c. 14, s. 6.

(*a*) The words of this clause are clearly inaccurate; "probably," says Mr. Baron Parke, "from a mistake in the transcriber into the parliamentary roll." Lord Abinger suggested another, and very ingenious account for the introduction of the word. "The manuscript of this clause most probably contained the word *thereupon;* on revising it, the author considered that the word was superfluous to express his meaning, and that it might possibly, if it had any effect, rather narrow the construction. He has, therefore, meant to strike it out, but has not carried his erasure with sufficient force through the latter part of the word. The word *upon* has, therefore, found its way into the print, and has escaped notice afterwards when the bill was in committee. The printers of bills for the two houses seldom commit an error on the side of omission. Every thing which is not beyond doubt erased in MS. is sure to be served up in print; and, if it should afterwards escape detection in committee, finds its way upon the rolls of parliament, and into the statute book." 1 Mees. & Wels. 115, 123. The mistake alluded to may certainly have been that of the *transcriber*, as suggested by Mr. Baron Parke, or of the *author*, as suggested by the Lord Chief Baron; but a third account may be proposed, perhaps equally or more probable, viz. that the *compositor*, when correcting the proof sheet for press, misplaced the word "credit," which originally stood, according to this supposition, after the words "money or goods upon" *credit*. This is by no means an uncommon source of error in printed books.

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ported by the greatest weight of argument, seems to be, that this enactment applies only to those cases in which the representation, relating to the trustworthiness of a third person, is made with the intent that he may obtain *personal* credit on the faith of such representation; and not where it is made as to the state of some specific property—not as an element of trustworthiness—but with the view to obtain a right to the thing itself (*a*). If, indeed, the representation as to the condition or value of a particular part of a man's property, is made to one whose declared object is to give credit to another upon his personal responsibility, and who is seeking information as to part of the means which constitute its value, this is justly considered to be a case falling within the Act (*b*); and such representation, in order to be the ground of an action, must be made in writing, signed by the party to be charged.

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Of Title by Descent.

Descent defined.

X. Descent is the means whereby one (or more) on the death of an ancestor acquires his or her

(*a*) *Per* Parke, B., in *Lyde* v. *Barnard*, 1 Mees. & Wels. 116. The question was raised in this case, but the Judges being equally divided in opinion, no *judgment* was given. The opinion adopted in the text was expressed by Mr. Baron Parke and Mr. Baron Alderson, who differed from Mr. Baron Gurney and Lord Abinger, C. B.

(*b*) *Per* Parke, B., ut sup.

estate as heir at law. An heir, therefore, is the person (or persons) upon whom the ancestor's estate devolves, immediately on his death; and an estate so devolving is termed the inheritance (*a*). In this country, hereditary succession takes place in the event only of the ancestor's intestacy. The first thing, therefore, to be ascertained in the case of an alleged descent, is the intestacy of the ancestor as to the estate in question. This may be proved, either by the letters of administration taken out to his effects, or, if he executed a will, by producing it or the probate, to shew that no devise was made of the estate alleged to have descended. Assuming then that a descent has taken place, the question is, upon whom does the law cast the inheritance? In other words, who is the heir? And this must be determined by the rules or canons of descent.

Intestacy of ancestor essential to hereditary succession.

XI. The first canon (as laid down by Sir William Blackstone) is, that inheritances shall lineally descend to the issue of the person who last died actually seised, in infinitum; but shall never lineally ascend. According, then, to this rule, the relation of ancestor and heir in respect of any inheritance cannot properly subsist, unless such ancestor was "actually seised," *i. e.* had possession of the estate, either by his own entry or that of a tenant for years, or by having received rent from a lessee of the freehold;

CANONS OF DESCENT.

Inheritances shall lineally descend to the issue of the person who last died actually seised, in infinitum; but shall never lineally ascend.

(*a*) Bla. Com. ii. 201; Sheppard's Abr. P. ii. p. 20. The account above given of the canons is principally taken from the Commentaries.

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or in case of incorporeal hereditaments, *e. g.* advowsons, tithes, rents, &c., and of estates in reversion and remainder, by having exercised acts of ownership, such as presentation, receipt, alienation, or the like (*a*). But it is now enacted by the 3 & 4 Will. 4, c. 106, ss. 2 & 11, that in every case happening after the 1st January, 1834, Descent shall be traced from the *purchaser*, *i. e.* the person who last acquired the *land* (*b*) otherwise than by descent, or than by an escheat, partition, or inclosure, by the effect of which

"Purchaser."

(*a*) Bla. Com. ii. 210; Cruise's Dig. iii. 344, fourth edit.

(*b*) *Meaning of words in the Act*:—By s. 1, it is enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "Land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-english, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words "the Purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "Descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "Descendants"

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the land (under which term is comprehended *any interest* whatsoever *capable of being inherited*) shall have become part of or descendible in the same manner as other land acquired by descent; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the Title shall require, the *person last entitled* to the land, *i. e.* the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof, shall, for the purposes of this Act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same; in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same (*a*). The canon too prescribes

Descent shall always be traced from the purchaser, but the last owner shall be considered to be purchaser, unless the contrary be proved.

of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "the Person last entitled to Land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "Assurance" shall mean any deed or instrument (other than a Will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

(*a*) By s. 3, it is enacted, that when any land shall have been devised, by any testator who shall

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that inheritances shall never "lineally ascend," *i. e.* a father, mother, or other lineal ancestor, *as such*, shall never succeed to a descendant (*a*). It is now enacted, however, by the 3 & 4 Will. 4, c. 106, s. 6, that every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descen-

Lineal ancestor may be heir in preference to collateral persons claiming through him.

die after the thirty-first day of December one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said thirty-first day of December one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

And by s. 4, it is further enacted, that when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land.

(*a*) Prest. Abs. ii. 423; Bla. Com. ii. 209.

dant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. And here it may be remarked, that, in case of a descent from one brother or sister to another, it has been usual to consider the succession as *immediate* (*a*). It is now enacted, however, by the 3 & 4 Will. 4, c. 106, s. 5, that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

Brothers, &c. shall trace descent through their parent.

XII. The second canon of descent is, that the male issue shall be admitted before the female. *E. g.* if John Stiles has two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession in preference to both the daughters (*b*).

Male issue shall be admitted before the female.

XIII. The third canon is, that where there are two or more males in equal degree, the eldest only shall inherit; but the females altogether. *E. g.* If a man has two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but if both the sons die without issue

Where there are two or more males in equal degree, the eldest only shall inherit; but the females altogether.

(*a*) See Real Prop. Rep. i. 12.
(*b*) Bla. Com. ii. 212.

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before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners (*a*).

That the lineal descendants, in infinitum, of any person deceased shall represent their ancestor.

XIV. The fourth canon is, that the lineal descendants, in infinitum, of any person deceased shall represent their ancestor; *i. e.* shall stand in the same place as the person himself would have done, had he been living. Thus the child, grandchild, or great grandchild (either male or female) of the eldest son succeeds before the younger son, and so in infinitum. And these representatives shall take neither more nor less, but just so much as their principals would have done. *E. g.* If there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies, without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; *i. e.* a moiety of the lands of John Stiles in coparcenary; so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte, the surviving sister, shall have six, and her six nieces, the daughters of Margaret, one a-piece (*b*).

On failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser: subject to the three preceding rules and enactments.

XV. The fifth canon is, that on failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules and enactments. *E. g.* If Geoffrey Stiles purchases land, and it descends to

(*a*) Bla. Com. ii. 214; Litt. § 5. (*b*) Bla. Com. ii. 217.

John Stiles, his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family (*a*).

The collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

XVI. The sixth canon is, that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood. According to this rule, a brother of the deceased proprietor by the same father, but a different mother, could not inherit to the deceased proprietor, whether he took by purchase or descent. And the estate, indeed, would rather escheat. The hardship of this rule having long been felt, it was enacted by the 3 & 4 Will. 4, c. 106, s. 9 (*b*),

(*a*) Bla. Com. ii. 220.

(*b*) "We think it advisable," said the Commissioners on whose suggestions this Act was founded, "that no distinction should exist between the whole and the half blood, except that preference should be given to the whole blood of the first purchaser, as between his kindred in equal degree or their descendants, with the exception of a single case afterwards mentioned.

"The following reasons seem to us sufficient for putting the whole blood and the half blood on an equal footing, with the above exception.

"1st. One ancestor only of any couple of ancestors, being the person from or through whom the inheritance descends, it seems needless to have any regard to the other ancestor. Thus, if land descends from the father to the eldest son, there seems no reason why it should not pass from him to the second son, whether born of the same or another mother.

"2nd. The rule is recommended by the principle of conformity already suggested, as in the transmission of personal estate, the whole blood and half blood stand on an equal footing, and so in case of descent of a title of nobility, or of an estate tail.

"3rd. The difference between the whole and the half blood, however well understood by lawyers, is, it is believed, not familiar to the public; lands are therefore liable to be left to descend contrary to the intention

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Half blood, if on the part of a male ancestor,

that any person related to the person from whom the descent is to be traced by the half blood shall be

of the owner, and they are liable to be claimed and to be possessed contrary to the law without an evil intention; and further, in deducing the title on sales of estates, the circumstance of the half blood, being not of very frequent occurrence, is liable to be overlooked by those who prepare the abstract of title, and by those who know nothing of the pedigree but what is laid before them, and thus a bad title may be approved of by the advisers of a purchaser for valuable consideration, and accepted by him. Whatever leads to insecurity of titles, is of course, independently of other considerations, greatly objectionable.

"Some of the above reasons apply with equal force to the case in which a person who died seised was himself the purchaser.

"The reason which has inclined us to give a limited preference to the whole blood in this case is, that when one parent has issue by another marriage, the connexion between the members of the two families is felt to be much less than between the members of each family. If a brother leave a whole brother or sister, or the issue of either of these, and also an elder brother by a different marriage, it would be repugnant to common feelings and notions, to direct his estate to descend to the half brother; although, if he left a brother or sister of the half blood, or the issue of such, and only a more remote relation of the whole blood, the proximity of kindred would seem to give a reasonable preference to the former. It would be desirable, if, with reference to the half blood, a distinction could be drawn between the case of a purchaser by his own act, according to the familiar use of the word purchaser, and that of a purchaser in the mere technical sense of the word, that is, a person who may have succeeded, perhaps, to the family eatate, but is considered as a purchaser, because it comes to him through some deed or will, and not by inheritance, and in the latter case to put the whole and the half blood on an equal footing. It is considered, however, impracticable to frame a law founded on this distinction, which should be clear and simple, except, indeed, that a power may be given to the person from whom the property comes of directing that it shall be taken as if it descended from a particular line of ancestors as hereafter explained, in which case we think the distinction of the whole and half blood may also be taken away.

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capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.

XVII. The seventh and last canon is, that in collateral inheritances, the male stocks shall be preferred to the female, *i. e.* kindred descended from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near; unless where the lands have in fact descended from a female. And by the 3 & 4 Will. 4, c. 106, s. 7, it is enacted and declared, that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all

In collateral inheritances, the male stocks shall be preferred to the female.

The male line to be preferred.

"It is proposed, therefore, that the whole blood of the first purchaser, who took without reference to any ancestor, shall be preferred, as between persons claiming through the same ancestor of the first purchaser, to the half blood, and that, subject to this preference, the distinction between the whole and the half blood shall be abolished." Real Prop. Rep. i. 12, 13.

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his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed. It is then, by s. 8, further enacted and declared, that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants.

The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

Tables of descent illustrative of the foregoing canons and enactments.

XVIII. To explain and illustrate the foregoing canons and enactments, the following Tables of Descents are introduced. The first Table, originally laid down by Sir William Blackstone, exhibits the order of succession, indicated by the figures, according to the common law, before the alterations effected by the 3 & 4 Will. 4, c. 106; and the second Table, laid down by the Real Property Commis-

SECTION 2.

sioners, exhibits it according to the present state of the law. With respect to any descent which shall have taken place on the death of any person who died before the first of January, 1834, it is still necessary to adhere to the old canons of the common law, disregarding altogether the provisions of the above-mentioned Act. And by s. 12, it is enacted, that where any assurance, executed before the said first day of January, one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January, one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four.

Act not to extend to any descent before Jan. 1834.

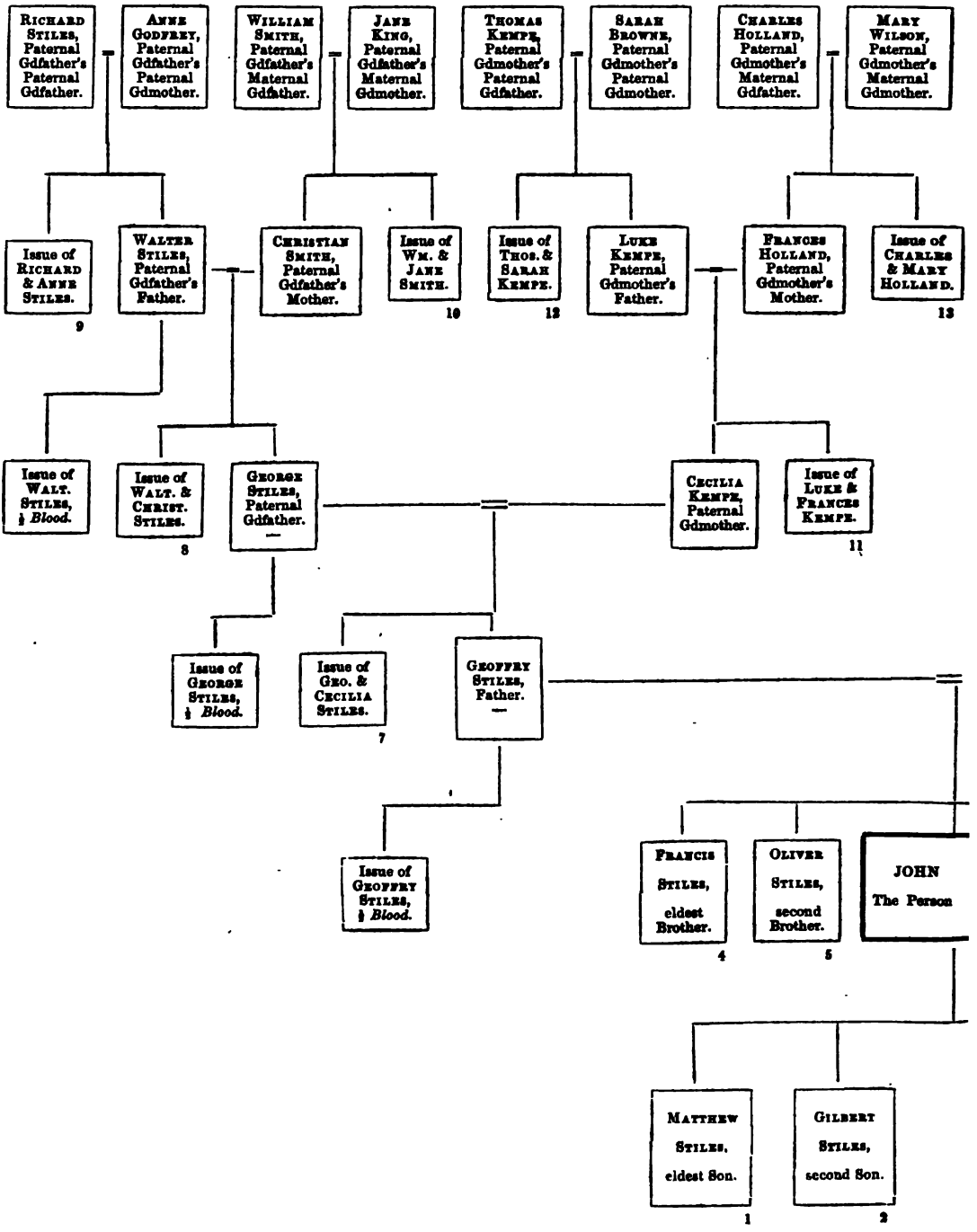
Limitations made before the 1st Jan. 1834, to the heirs of a person then living, shall take effect as if the act had not been made.

It will be observed, that Sir W. Blackstone's table of descents differs from that laid down by Mr. Cruise, who rejected the doctrine of the commentator, that the more remote female ancestor on the paternal side should be preferred to the one who was nearer. It being expedient to settle the question, the case having occurred more than once since the Commentaries were published, the commissioners proposed that Sir W. Blackstone's rule should be declared to be the law; which was accordingly done by the recent Act. (Vide Art. XVII).

TABLE OF

ACCORDING TO THE LAW

Paternal Line.


Richard Stiles, Paternal Gdfather's Paternal Gdfather.
Anne Godfrey, Paternal Gdfather's Paternal Gdmother.
William Smith, Paternal Gdfather's Maternal Gdfather.
Jane King, Paternal Gdfather's Maternal Gdmother.
Thomas Kempe, Paternal Gdmother's Paternal Gdfather.
Sarah Browne, Paternal Gdmother's Paternal Gdmother.
Charles Holland, Paternal Gdmother's Maternal Gdfather.
Mary Wilson, Paternal Gdmother's Maternal Gdmother.
Issue of Richard & Anne Stiles. 9
Walter Stiles, Paternal Gdfather's Father.
Christian Smith, Paternal Gdfather's Mother.
Issue of Wm. & Jane Smith. 10
Issue of Thos. & Sarah Kempe. 12
Luke Kempe, Paternal Gdmother's Father.
Frances Holland, Paternal Gdmother's Mother.
Issue of Charles & Mary Holland. 13
Issue of Walt. Stiles, ½ Blood.
Issue of Walt. & Christ. Stiles. 8
George Stiles, Paternal Gdfather.
Cecilia Kempe, Paternal Gdmother.
Issue of Luke & Frances Kempe. 11
Issue of George Stiles, ½ Blood.
Issue of Geo. & Cecilia Stiles. 7
Geoffry Stiles, Father.
Issue of Geoffry Stiles, ½ Blood.
Francis Stiles, eldest Brother. 4
Oliver Stiles, second Brother. 5
JOHN The Person
Matthew Stiles, eldest Son. 1
Gilbert Stiles, second Son. 2

DESCENTS,

BEFORE THE 3 & 4 WILL. IV., c. 106.

Maternal Line.

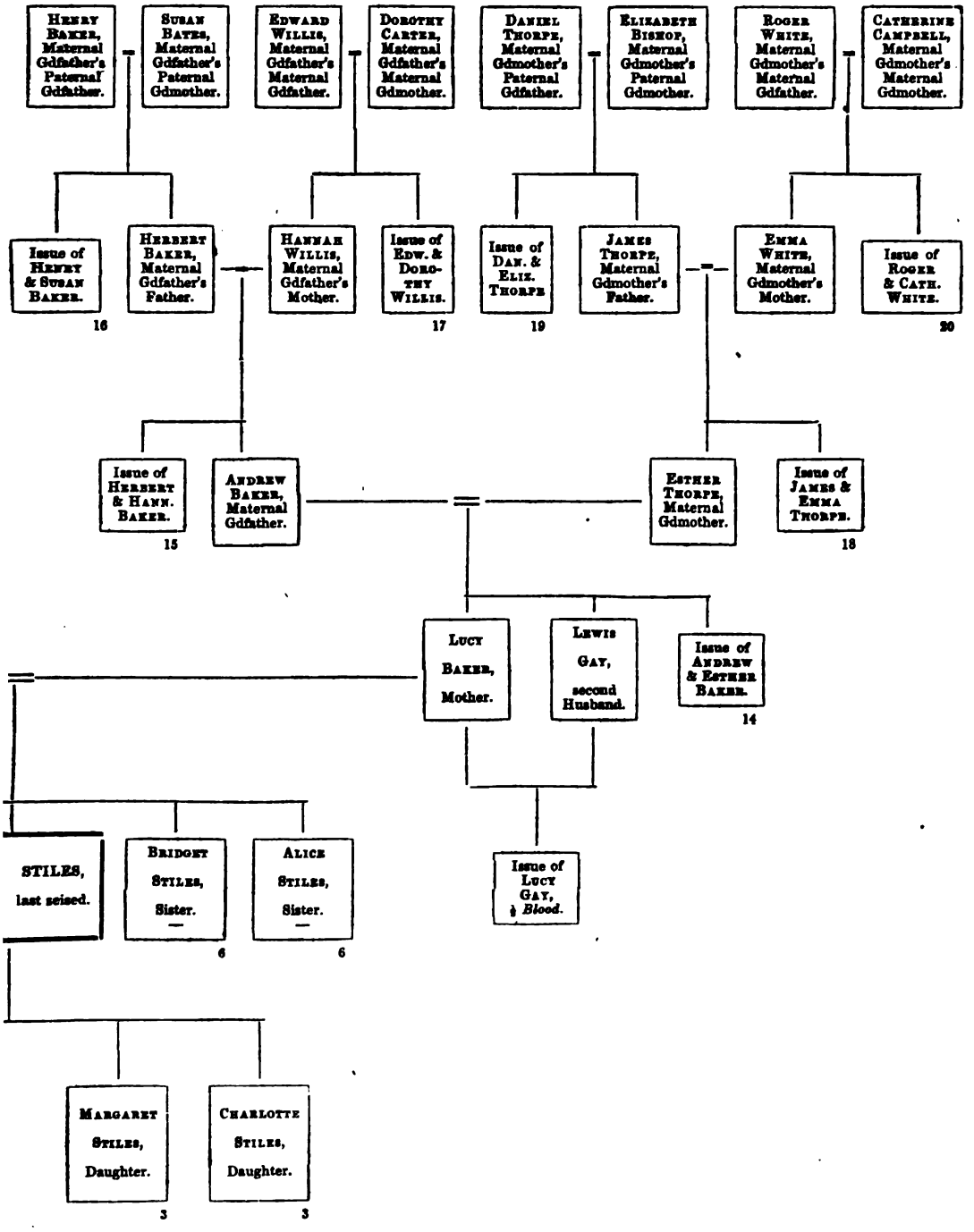
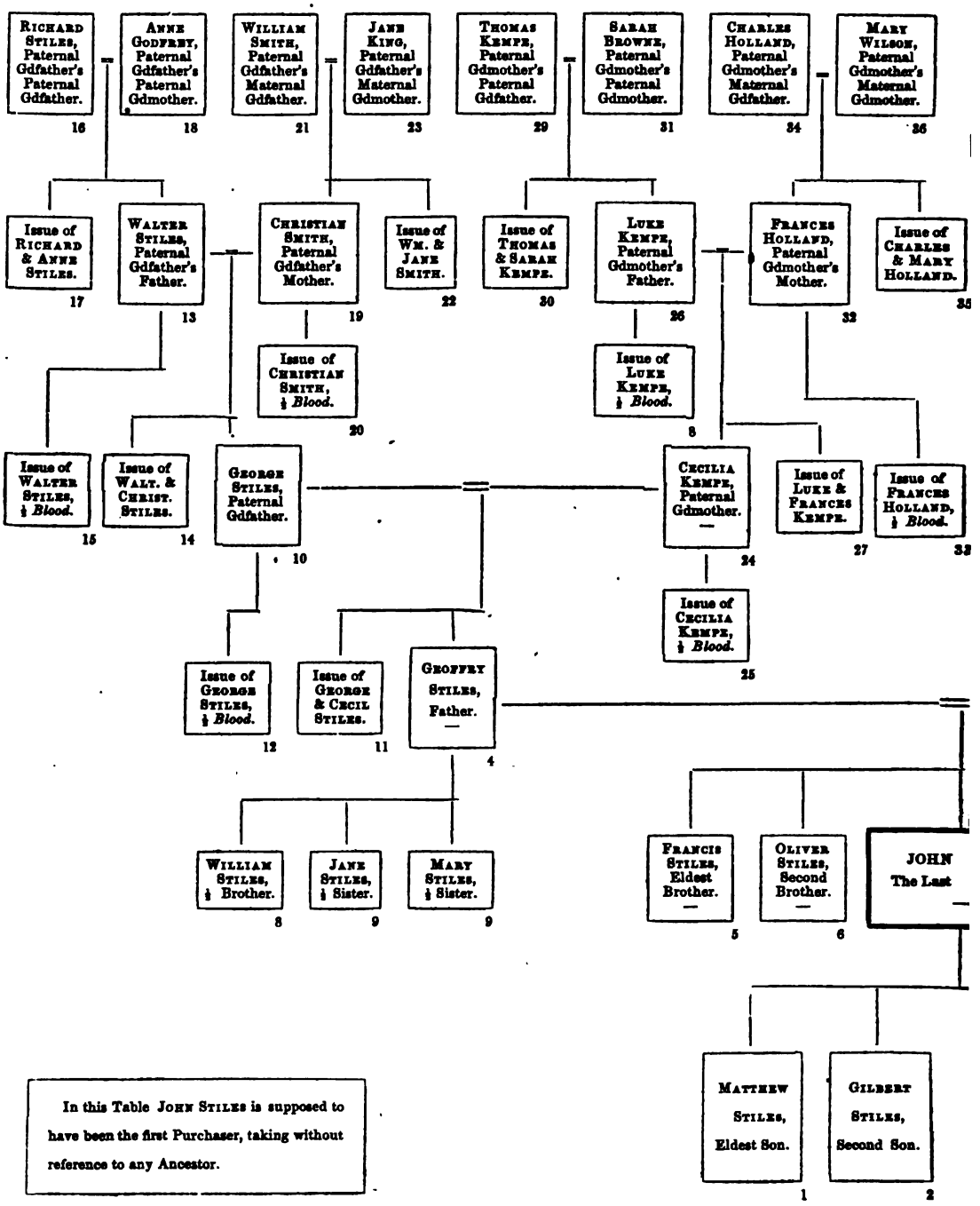

HENRY BAKER, Maternal Gdfather's Paternal Gdfather.
SUSAN BATES, Maternal Gdfather's Paternal Gdmother.
EDWARD WILLIS, Maternal Gdfather's Maternal Gdfather.
DOROTHY CARTER, Maternal Gdfather's Maternal Gdmother.
DANIEL THORPE, Maternal Gdmother's Paternal Gdfather.
ELIZABETH BISHOP, Maternal Gdmother's Paternal Gdmother.
ROGER WHITE, Maternal Gdmother's Maternal Gdfather.
CATHERINE CAMPBELL, Maternal Gdmother's Maternal Gdmother.
Issue of HENRY & SUSAN BAKER. 16
HERBERT BAKER, Maternal Gdfather's Father.
HANNAH WILLIS, Maternal Gdfather's Mother.
Issue of EDW. & DOROTHY WILLIS. 17
Issue of DAN. & ELIZ. THORPE 19
JAMES THORPE, Maternal Gdmother's Father.
EMMA WHITE, Maternal Gdmother's Mother.
Issue of ROGER & CATH. WHITE. 20
Issue of HERBERT & HANN. BAKER. 15
ANDREW BAKER, Maternal Gdfather.
ESTHER THORPE, Maternal Gdmother.
Issue of JAMES & EMMA THORPE. 18
LUCY BAKER, Mother.
LEWIS GAY, second Husband.
Issue of ANDREW & ESTHER BAKER. 14
STILES, last seised.
BRIDGET STILES, Sister. — 6
ALICE STILES, Sister. — 6
Issue of LUCY GAY, of the Blood.
MARGARET STILES, Daughter. 3
CHARLOTTE STILES, Daughter. 3

TABLE OF

ACCORDING TO THE LAW SINCE

Paternal Line.

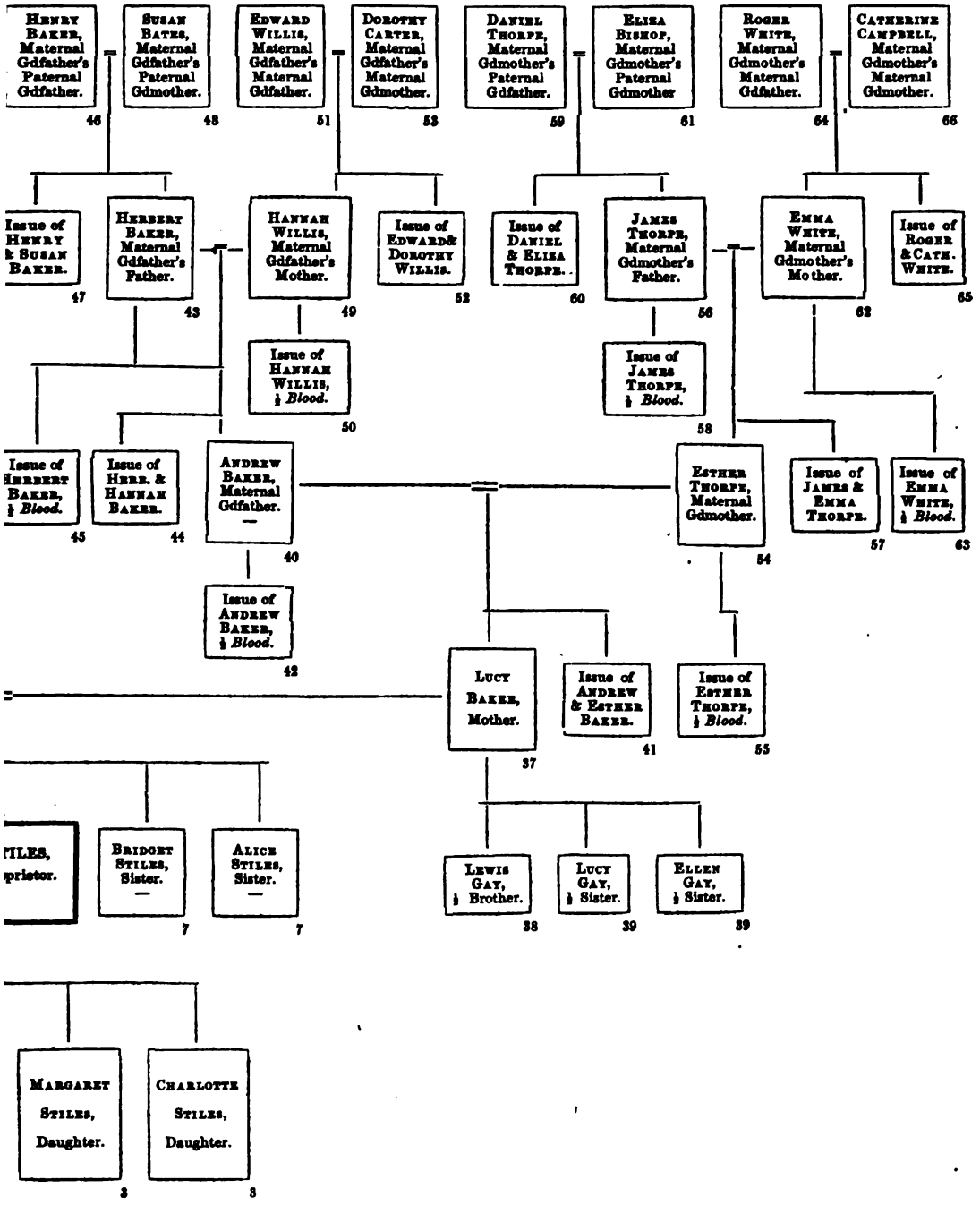

Richard Stiles, Paternal Gdfather's Paternal Gdfather. 16
Anne Godfrey, Paternal Gdfather's Paternal Gdmother. 18
William Smith, Paternal Gdfather's Maternal Gdfather. 21
Jane King, Paternal Gdfather's Maternal Gdmother. 23
Thomas Kempe, Paternal Gdmother's Paternal Gdfather. 29
Sarah Browne, Paternal Gdmother's Paternal Gdmother. 31
Charles Holland, Paternal Gdmother's Maternal Gdfather. 34
Mary Wilson, Paternal Gdmother's Maternal Gdmother. 36
Issue of Richard & Anne Stiles. 17
Walter Stiles, Paternal Gdfather's Father. 13
Christian Smith, Paternal Gdfather's Mother. 19
Issue of Wm. & Jane Smith. 22
Issue of Thomas & Sarah Kempe. 30
Luke Kempe, Paternal Gdmother's Father. 26
Frances Holland, Paternal Gdmother's Mother. 32
Issue of Charles & Mary Holland. 35
Issue of Christian Smith, ½ Blood. 20
Issue of Luke Kempe, ½ Blood. 8
Issue of Walter Stiles, ½ Blood. 15
Issue of Walt. & Christ. Stiles. 14
George Stiles, Paternal Gdfather. 10
Cecilia Kempe, Paternal Gdmother. 24
Issue of Luke & Frances Kempe. 27
Issue of Frances Holland, ½ Blood. 33
Issue of Cecilia Kempe, ½ Blood. 25
Issue of George Stiles, ½ Blood. 12
Issue of George & Cecil Stiles. 11
Geoffrey Stiles, Father. 4
William Stiles, ½ Brother. 8
Jane Stiles, ½ Sister. 9
Mary Stiles, ½ Sister. 9
Francis Stiles, Eldest Brother. 5
Oliver Stiles, Second Brother. 6
JOHN The Last
Matthew Stiles, Eldest Son. 1
Gilbert Stiles, Second Son. 2

In this Table John Stiles is supposed to have been the first Purchaser, taking without reference to any Ancestor.

NHERITANCE,

THE 3 & 4 WILL. IV., c. 106.

Maternal Line.



SECTION 2.

Estates tail.

XIX. The foregoing canons of descent are to be understood of estates in fee simple, and not of estates tail, nor of descents according to local custom; for, in many respects, these are governed by very different rules. With regard to the descent of estates tail, that depends principally on the terms of the donation; the statute of Westminster the second, *de donis conditionalibus*, having enacted that the will of the donor shall be observed. The issue in tail, therefore, claim *per formam doni*. Accordingly, if the gift be to one, and the heirs of his body, by some particular woman, none but the issue of their marriage can inherit. So, if lands be given to a man, and the heirs male of his body, no heirs female, nor any derived from them, can claim under such a limitation. And in like manner of an entail female, no male heir can inherit. Hence, if a man has two estates, one in tail male, the other in tail female, and he has issue a daughter, which daughter has issue a son; this grandson can succeed to neither of the estates; because he cannot convey his descent wholly, either in the male or female line (*a*). Where, however, the estate tail is *general, i. e.* to one and the heirs of his body, then the course of descent, not being restrained by the donor, is governed by the canons of the common law; with this difference only, that the rule requiring the heir to be of the *whole* blood of the person last

(*a*) Bla. Com. ii. 113; Co. Litt. 25. b. "And therefore," says Coke, "the safest way, when a man will entail his lands to the heirs male and female of his body, is to limit the first estate to him and the heirs male of his body, with remainder to him and to the heirs of his body; and then all his issue whatsoever are inheritable." Co. Litt. 25. b.

seised, and which was abolished by the 3 & 4 Will. 4, c. 106, § 9, never applied to estates tail. SECTION 2.

Gavelkind.

XX. The principal modes of descent derived from local customs, and which differ in many respects from the general custom of the realm or common law, are those that apply to estates held in gavelkind, in borough English, and by copy of court roll. According to the custom of gavelkind (*a*) the descent, in the right line, is among all the sons, as coparceners; and in default of sons, among all the daughters in the same manner: but although females, claiming in their own right, are postponed to males, yet they may inherit together with males by right of representation. And this partible quality of gavelkind lands applies to the collateral, as will the right line of heirship (*b*). Before the stat. 3 & 4 Will. 4, c. 106, §§ 1 & 9, came into operation (1 January, 1834), the half-blood were excluded in gavelkind lands as well as in estates in fee simple.

Borough English.

XXI. In some boroughs there is a custom that the youngest son shall inherit all the tenements of his fa-

(*a*) Gavelkind obtains in North Wales, but particularly in Kent. Indeed, it appears from a recital in the stat. 18 H. 6, that at that time not more than thirty or forty persons had any lands in Kent which were not gavelkind. Com. Dig. tit. Gavel. iv. 406. And the Courts will presume that all lands whatsoever, lying in the county of Kent, are of the nature of gavelkind, until the contrary be proved. Rob. Gav. p. 44, second edition. Much Kentish land, however, has been *disgavelled* by various acts of parliament, and converted into common socage; but most of these are said by Mr. Bell to be very old acts. See Real Prop. Rep. App. i. 228.

(*b*) Crui. Dig. iii. 388, 389; Rob. Gav. p. 92.

SECTION 2.

ther within the borough as his heir, and this is called "borough English" (*a*). This custom, as also that of gavelkind, extends to estates tail, and to descendible freeholds (*b*). And in both the right of representation takes place; so that, if the youngest son dies in the lifetime of his father, leaving a daughter, she will inherit (*c*). The custom of borough English is, however, confined to *lineal* descents(*d*); and, accordingly, where lands of this tenure descended to the youngest son, and he died without issue, it was held that his younger brother could not inherit, the eldest being the heir (*e*).

Copyholds.

XXII. With respect to estates held by copy of court roll, they are in general descendible according to the canons of the common law (*f*). And before the stat. 3 & 4 Will. 4, c. 106, § § 1 & 9 (though not since), the rule as to the exclusion of the half blood equally applied to lands of this tenure. In some places, however, the local custom of descent is very peculiar. In one manor, the widow succeeds as heir to her husband, to the exclusion of the issue; or, if no widow, the youngest brother succeeds; and, if there be no brother, the youngest sister; and if neither brother nor sister, then the youngest next of kin of the

Peculiar customs of descent.

(*a*) Litt. §§ 165, 211.

(*b*) Co. Litt. 110. b.; Rob. Gav. p. 94.

(*c*) *Clements* v. *Scudamore*, 1 P. Wms. 63; 2 Lord Raym. 1024; 1 Salk. 243. See *Locke* v. *Colman*, 1 Myl. & Cr. 423.

(*d*) Rob. Gav. p. 93.

(*e*) Crui. Dig. iii. 389.

(*f*) Co. Cop. § 50, p. 139; 4 Rep. 22. a.

whole and worthiest blood (*a*). In another manor, the land descends, in default of issue male, to the eldest daughter (*b*); and in a third, to the eldest son, or to the eldest daughter, or to the eldest sister (*c*). All customary modes of descent (except gavelkind and borough English, which have been termed "common law customs") must be established by proof; and the most conclusive evidence for this purpose, when any doubt arises, is the presentment of the homage or jury, who always act under the sanction of an oath (*d*). In practice, however, the conveyancer is commonly satisfied with a certificate from the steward of the manor, setting forth the customary mode of descent.

All customary modes of descent (except gavelkind and borough English) must be established by proof.

It is hardly necessary to add, that the owner of descendible property cannot prescribe for it a different mode of descent than that which is conformable to the course of the common law, or to local custom (*e*); and the power of the Crown, except in regard to the descent of honors (*f*), is equally limited (*g*).

Common law and customary modes of descent cannot be altered, except by the King, in regard to honors.

XXIII. Having thus briefly treated of the rules

Who are and who are not capable of being heirs.

(*a*) *Locke* v. *Southwood*, 1 Myl. & Cr. 420: *Locke* v. *Colman*. Ib. 430.

(*b*) *Godfrey* v. *Bullock*, 1 Roll. Abr. 623, pl. 3.

(*c*) *Denn* v. *Spray*, 1 T. R. 466.

(*d*) *Doe* d. *Foster* v. *Sisson*, 12 East, 62; *Locke* v. *Colman*, ut sup.

(*e*) Co. Litt. 27. a.

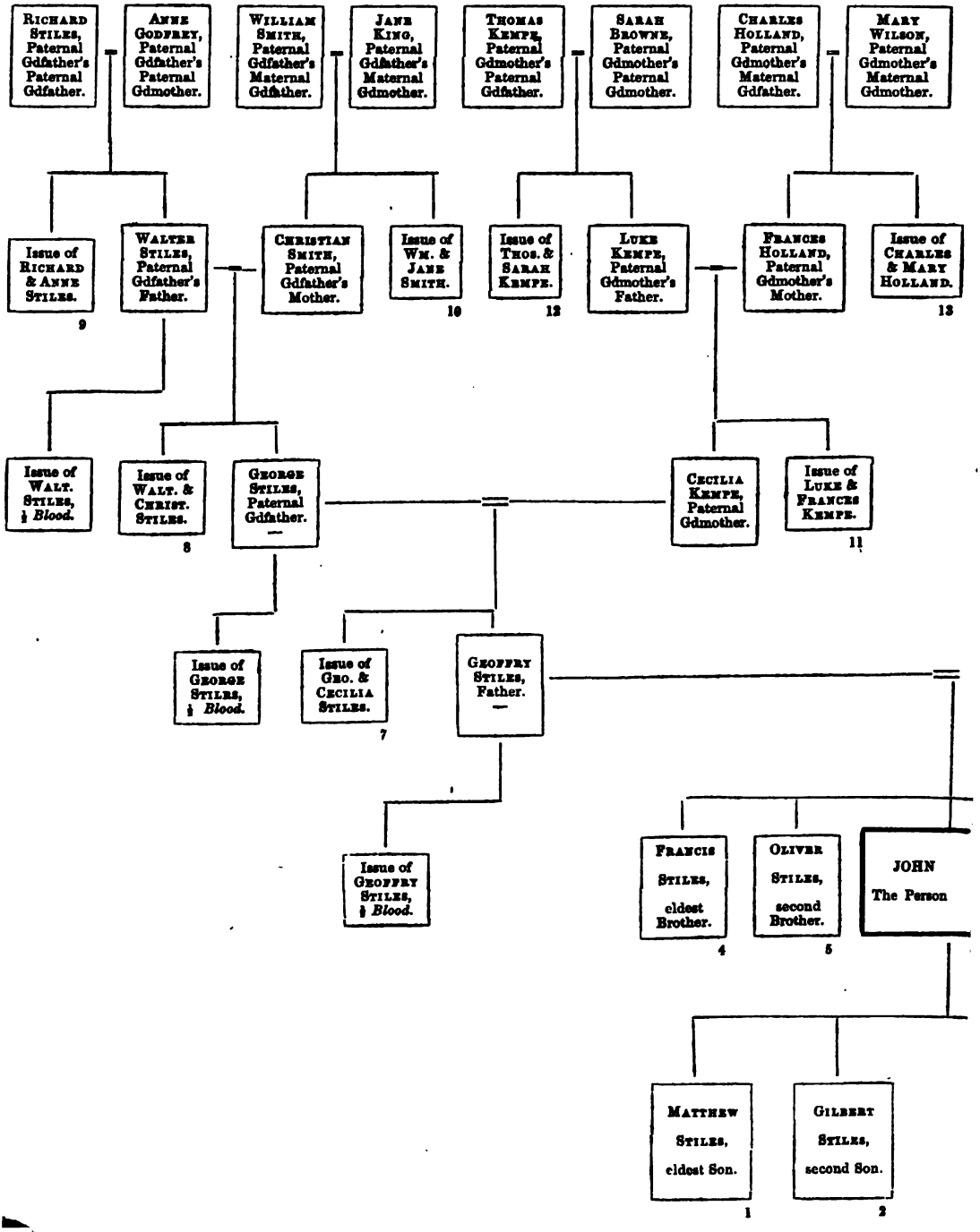
(*f*) *Earl of Devon's case*, 2 Dow & Cl. 200; Crui. Dig. iii. 238.

(*g*) *The Prince's case*, 8 Rep. 1.

TABLE OF

ACCORDING TO THE LAW

Paternal Line.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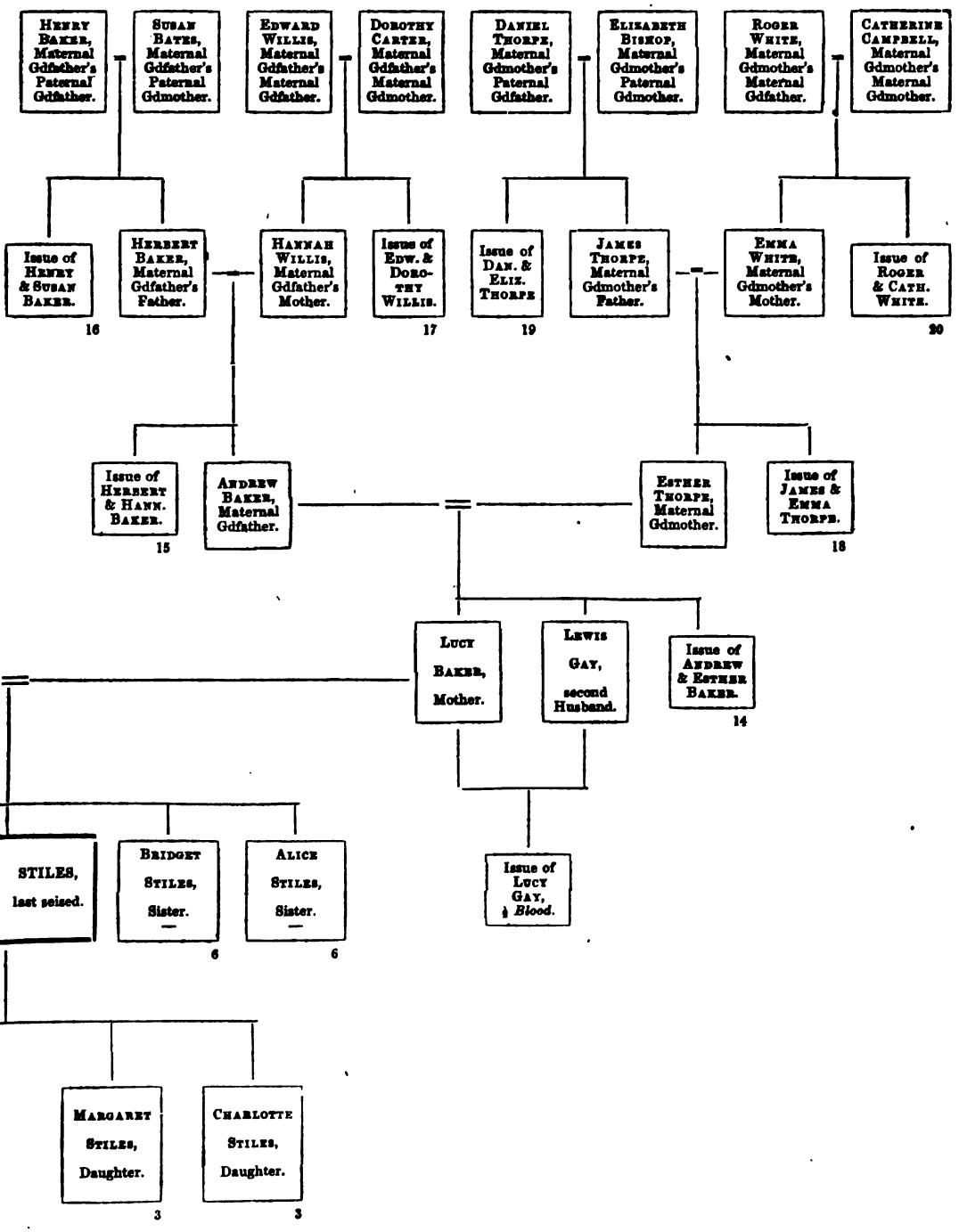
DESCENTS,

BEFORE THE 3 & 4 WILL. IV., c. 106.

Maternal Line.



SECTION 2.

Comity of nations cannot alter the law of descent.

capable of inheriting lands in Scotland; but he cannot inherit lands in England (*a*); for, although the "comity of nations" (*b*) gives to him the character of legitimacy, with all the rights necessarily consequent upon that character, yet what those rights are respecting English land must be left to the law of England; and the comity is wholly ineffectual to alter,

from the moment the other is given up.

The foregoing rules principally relate to changes of domicil from one place to another within the same country, although many of them are applicable to residence in different countries. In respect to the latter, the following are recognised by the public tribunals as of unquestionable authority. 1. Persons are generally deemed citizens and subjects of the country in which they are born. 2. Foreigners, who reside in a country for permanent or indefinite purposes, *animo manendi*, are treated universally as inhabitants of that country. 3. A national character, acquired in a foreign country by residence, changes when the party has left the country *animo non revertendi*; and if he be *in itinere* to his native country with that intent, his native domicil revives. 4. Ambassadors and other foreign ministers retain their domicil in the country which they represent, and to which they belong. But a different rule generally applies to consuls, and other commercial agents, who are presumed to remain in the country for the purposes of trade, and therefore acquire a domicil there. 5. Children born upon the sea are deemed to belong to, and have their domicil in the country to which their parents belong.

From these rules, Dr. Story infers that domicil is of three sorts — domicil by birth, domicil by choice, and domicil by operation of law. The first is the common case of the place of birth, *domicilium originis*; the second is that which is voluntarily acquired by a party, *proprio marte*; and the last is consequential, as that of the wife arising from marriage. — Story's Com. on the Conflict of Laws, ch. iii. §§ 44—49.

(*a*) *Doe* d. *Birtwhistle* v. *Vardill*, 5 Barn. & Cr. 438; 6 Bli. N. S. 479.

(*b*) By the "comity of nations," is meant the obligation of

DESCENTS,

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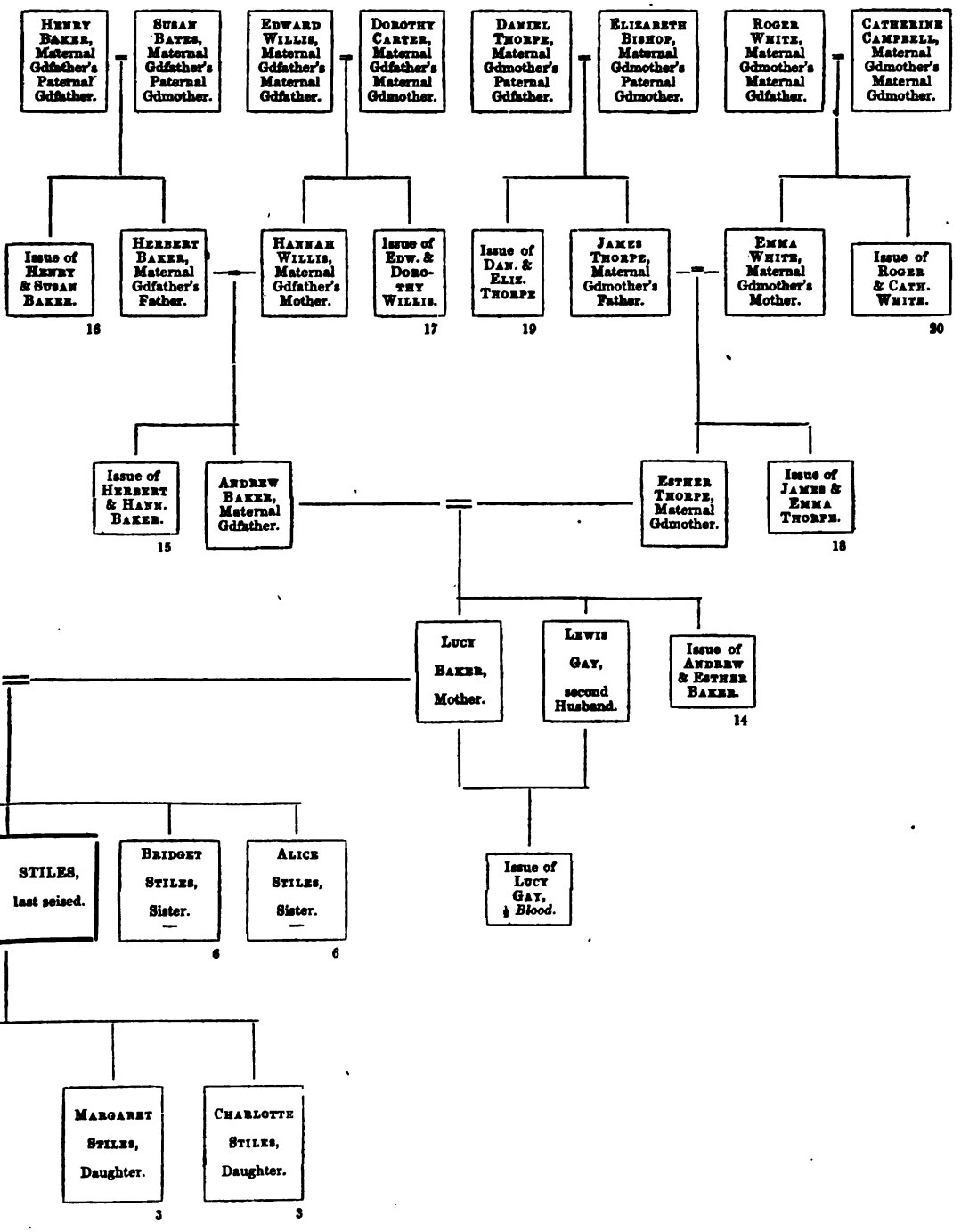
Maternal Line.



SECTION 2.

by *physical* impossibility, what is at variance with the laws of nature; and, by *moral* impossibility, that high degree of improbability which leaves no room for doubt. Under the first division may be classed impotency and non-access; and under the second, all those circumstances which can have the effect of raising in the minds of the jury or judges (when exercising the function of a jury) a preponderating presumption that the child is not the issue of the husband (*a*). This circumstantial evidence (as Lord Eldon remarks) is "nothing more than evidence of those circumstances, which usually accompany facts, from the proved existence of which circumstances, both law and reason in-

History of the law of Adulterine Bastardy.

(*a*) *Banbury Peerage case*, Le Marchant, pp. 432, 489; Nicolas's Adulterine Bastardy, pp. 458, 522. "The law of Adulterine Bastardy," according to Sir H. Nicolas, "has undergone two important changes, without the intervention of any act of the legislature; and the principle of *certainty*, upon which it formerly proceeded, and which the great lawyers of past ages considered it sound wisdom to uphold, no longer exists. Until the year 1717, that principle was so rigidly acted upon, that a child born in wedlock could not be bastardized, unless the parties were separated by a sentence of divorce, by evidence of the husband's impotency, or of his absence from the realm when it was begotten. But, as reason and common sense shewed that it might be as *impossible*, physically and morally, in many cases, for the husband to have begotten the child, as if he had been beyond the seas, the maxim of the *quatuor maria* fell into desuetude. The next and most important innovation was, to allow the presumption of sexual intercourse to be rebutted by whatever evidence a Court or jury may consider sufficient to prove that it did not take place, at a time when, if it occurred, the person, whose status is in dispute, might have been the fruit of such intercourse; and which, to judge from recent decisions, is *now the law on the subject.*" pp. 280, 281.

fer the existence of the facts themselves" (*a*), or, as Dr. Whately expresses it, "As far as any circumstance is, what may be called a *condition* of the existence of a certain effect or phenomenon, so far it may be inferred from the existence of that effect: if it be a condition *absolutely essential*, the argument is of course demonstrative; and the probability is stronger in proportion as it approaches that case." A good illustration of this species of evidence was given by Lord Eldon, when delivering his opinion on the *Banbury case*:—"When the two women," said he, "each claimed a particular child as hers, and called upon a person to decide between them, he ordered that the child should be severed into two parts, and that each take half. The true mother instantly waived her claim; and he decided upon that, that the child was hers." Still, to use the eloquent language of Sir Samuel Romilly (*b*), "we must not overlook the danger of trusting too implicitly on circumstantial evidence. If the connexion between cause and effect in the material world has so long baffled every philosophical inquirer, surely we ought to approach with diffidence a similar investigation in the moral world. Who can pretend to ascribe to each act of man its real motive, and to hit with an unerring aim the hidden and indefinable source of human impulse?" SECTION 2.

XXV. With respect to posthumous children, the law has varied, at least from the rule laid down by Ultimum tempus parendi.

(*a*) Le Marchant, p. 490; Nicolas, p. 522.

(*b*) Le Marchant, p. 424; Nicolas, p. 448.

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Lord Coke, who regarded forty weeks as the *ultimum tempus pariendi* (*a*): the general opinion, fortified by the medical evidence given in the *Gardner case*, now is, that gestation may be protracted beyond the period above mentioned—to what extent, however, has neither been ascertained *de facto*, nor *de jure* defined.

Natural-born subject.

XXVI. Again, it is an established rule, that no one is capable of inheriting, unless he is a natural born subject, or naturalised by act of parliament, or "idenized," (as Bacon terms it), *i. e.* made a denizen by the King's letters patent. According to the common law, every one born out of the allegiance of the Crown, or, if within its dominions, of parents not in actual obedience to the Crown, was accounted an alien (*b*). It was, however, enacted by the stat. 25 Edw. 3, § 2, that all children born abroad, whose fathers and mothers were, at the time of their birth, in allegiance to the King, (the mother having passed the seas with her husband's consent), might inherit, as if born in England. And by the stat. 7 Anne, c. 5, it was enacted, that the children of all natural-born subjects, born out of the allegiance of the Crown, shall be deemed to be natural-born subjects. Doubts having arisen respecting the construction of this act, it was enacted, by the stat. 4 Geo. 2, c. 21, that all children born out of the allegiance of the Crown, or which should be born out of such allegiance, whose *fathers*

Who deemed an alien by the common law.

Common law altered by the 25 Edw. 3, s. 2.

7 Anne, c. 5.

4 Geo. 2, c. 21.

(*a*) Co. Litt. 123. b., n. by Mr. Hargrave; and see also Hargrave's Juris. Exer. iii. 409.

(*b*) *Calvin's case*, 7 Rep. 16 a, 18 a; Com. Dig. tit. Alien, (A), i. 540, 541.

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were or should be natural-born subjects at the time of the birth of such children, should be adjudged to be natural-born subjects, provided their fathers were not attainted of high treason, or liable to the penalties of high treason, in case of their returning to Great Britain or Ireland; or were not in the service of any state in enmity with Great Britain. And the provisions of the two last-mentioned statutes were further extended by the 13 Geo. 3, c. 21, to grandchildren on the father's side, by enacting, that all persons born out of the allegiance of the Crown of England or of Great Britain, whose fathers were or should, by virtue of the statutes 7 Anne and 4 Geo. 2, be entitled to the rights and privileges of natural-born subjects, should be deemed natural-born subjects: so that the ultimate effect of these enactments is, that any child or grandchild born out of the King's allegiance, whose father or grandfather was, at the time of the birth of such child, not only a subject, but a subject by birth, (for both characters must unite in the ancestor), is capable of inheriting lands in England (*a*). Hence it follows, that one born abroad of a mother who was a natural-born subject, but of a father who was an alien, does not derive inheritable blood in this country; for the privilege conferred by the foregoing statutes is confined to the *paternal* line (*b*).

13 Geo. 3, c. 21.

Any child or grandchild born out of the King's allegiance, whose father or grandfather was at the time of the birth of such child a natural-born subject, is capable of inheriting.

XXVII. According to the definition above given, one who is born of parents, not in actual obedience to the Crown, is an alien; and hence, children born

Children born in the United States since 1783, of parents born there be-

(*a*) 2 Barn. & Cr. 795.

(*b*) *Doe* d. *Douroure* v. *Jones*, 4 T. R. 300.

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fore that time, and continuing to reside there afterwards, are aliens.

in the United States of America since the recognition of their independence by the treaty of peace in 1783, of parents born there before that time, and continuing to reside there afterwards, (*thus putting off their allegiance to the Crown of Great Britain*), have been held to be aliens, incapable of inheriting lands in this country (*a*). And this judgment is conformable to the decisions of the courts of the United States upon a similar question brought before them, on the claim of a British subject to land in America; with this difference only, that, instead of reckoning the independence of the United States from the treaty of peace in 1783, when it was *recognised* by Great Britain, they refer back to 1776, the time when it was *declared* (*b*). Notwithstanding, however, these decisions, some very eminent counsel of the Scottish bar (*c*) have strenuously contended against

(*a*) *Doe* d. *Thomas* v. *Acklam*, 2 Barn. & Cr. 773. If the parent did not adhere to the United States at the time of the treaty, the case is then within the stat. 4 Geo. 2, c. 21. *Auchmuty* v. *Mulcaster*, 5 Barn. & Cr. 771.

(*b*) Kent's Commentaries on American Law, ii. 56, 59, third edit. (New York, 1836), referring to *Reed* v. *Reed*, 1 Munf. 225; *Dawson* v. *Godfrey*, 4 Cranch, 321; *Jackson* v. *Burns*, 3 Bonney, 75; *Blight* v. *Rochester*, 7 Wheat. 535.

(*c*) The MS. opinions of the Scottish lawyers are too voluminous for quotation: the following extract, however, will be read with interest, when known to be from the pen of *Lord Jeffrey*: — "By the treaty of 1783, the independence of the United States is no doubt fully recognised, and the character of citizens of that new state is conferred on all its permanent and voluntary inhabitants. But there is no provision in that treaty forfeiting or renouncing for such persons their rights and privileges as denizens of Great Britain; and the question therefore is, whether such forfeiture or renunciation can be legally inferred

the alienage; but the views entertained by them have not been generally acquiesced in: and some members of the English bar, equally distinguished for

from the terms of the treaty. Now, we humbly conceive, that one individual may completely acquire the right of a denizen or free citizen of any country without forfeiting thereby any similar rights that he may have previously had in another. It is a certain fact, at least, that thousands of natural-born British subjects have within the last twenty or thirty years acquired the full rights of natural-born citizens of America, chiefly for the purpose of mercantile speculations, or other gainful pursuits in that country, and have resided more or less in its territory, without its having been surmised that they thereby became aliens as to Great Britain, or incapable of holding or succeeding to lands in this country. During the prevalence of what was called the continental system, in the late war, hundreds of Britons in like manner were for similar purposes naturalized, and became citizens of various of the small states in the north of Europe; and yet no one it is believed ever thought of dealing with them on this account as aliens, or of depriving them of their rights of inheritance. We are not aware, indeed, that there is any authority for denying that a man may have the rights of a denizen in two or more countries, and may in time of peace claim all the privileges, and be liable to the duties of a citizen in them all. In the case of a war between these countries, indeed, the distressing question of double allegiance will arise; and the principles are perhaps not yet settled on which it should be adjusted. But, in time of peace, and in so far as regards ordinary civil rights, we conceive that a man may lawfully be a citizen of two countries; and that the mere acquisition of the rights of citizenship, whether in a new or in an old country, can never of itself infer the forfeiture of any such right of citizenship as he previously enjoyed in another.

"But the treaty of 1783 merely gives to persons who were previously natural-born subjects of Great Britain, the rights of the citizens of the new and independent States of America, and contains nothing importing a forfeiture or deprivation of their original rights as subjects, which we are of opinion might competently and would naturally remain with them along with those afterwards acquired, if the only objection to this were found-

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their learning and for the high judicial honours since conferred upon them, have emphatically expressed their opinion in favour of the construction adopted

ed upon the supposed inconsistency of those characters, or the incompatability of those accumulated rights.

"The difficulty of the case, however, we are sensible, arises from the fact, that this is not the only objection. That the treaty of 1783 is not the mere act of America executing its grant of citizenship as an independent state, to certain persons who were also subjects of Great Britain, but the joint act of Great Britain herself, who is supposed to have expressly and completely renounced her claims to allegiance; and, finally, relieved all those persons from the duties and obligations which are the necessary counterparts of the rights and privileges peculiar to the character of subjects.

"It is impossible to deny that this consideration involves the question in great difficulty, and constitutes a specialty which does not occur in the case of British subjects getting themselves naturalized individually in America since her independence, or in any other foreign country; but still we are not satisfied that it is decisive of the alienage of the memorialist, or excludes the general principle, to which we have referred. And *that*, in the first place, because we do not see that the treaty does any where expressly renounce the personal allegiance of the individuals then in America, or release them from this obligation as subjects. On the contrary, the recognition of their rights to govern themselves as independent states in America, seems to be studiously expressed in such a way as to guard against that interpretation—that his Majesty renounces having 'any claim to the government, property, and territorial rights of the said states, or any part thereof.' And, in the second place, because there are various provisions in the treaty itself, and especially in the fifth article, and in subsequent British statutes, which seem to recognise in British subjects the right of holding and succeeding to lands in America. And, in the third place, because any other construction would lead to consequences which cannot be supposed to have been in the view of those who made that treaty, and are in themselves unjust and inextricable. If the treaty of 1783 made aliens of all in whom it recognised the rights of American citizens, it must have made aliens of all who were then resident out of the British quarters in America, and of

by the English and American Courts. "The grounds upon which the Court of King's Bench founded their

course of all the American loyalists not actually in arms for their sovereign. But, if this could not have been contemplated, where is the line to be drawn? Or, how can it be accounted for that no line is drawn, and no provision made for those cases in the treaty? The most devoted loyalist may have been compelled by his circumstances to remain all his days in the territory of the new republic; and if he would not lose his character of a subject by lingering there a year or two to settle his affairs, why should he or his descendants lose it by remaining there on the same consideration down to the present time? Or, how is it possible to suppose that his denizenship or alienage is to be determined by a vague, and in many cases, impracticable proof of his private leanings or affections, indicated by ambiguous words or actions? The conclusion is, that though the future government of the provinces was declared to be independent, and the states in all time coming to be sovereign and free, the subjects of the Crown were not individually deprived of their original and consistent rights as such, nor released from their corresponding obligations.

"A separate and additional ground of argument in behalf of the memorialist arises from the statutes of Queen Anne, Geo. 2, and Geo. 3, already referred to, by which the rights of natural-born subjects are secured to the children and grandchildren of persons enjoying that character, though born out of the realm, and of course having all the rights and doing the duties of foreign citizens. Children born in France of English parents, domiciled in that country, are, upon common law principles, natural-born subjects of France, and aliens to the land of their parents. But, by those statutes, they have also the privileges of natural-born subjects of Great Britain. Now, even supposing that the memorialist's father would have become an alien upon common law principles in 1783, what is there to bar the saving effects of those statutes in preventing the attaching of their alienage by actual birth and domicil? The country by that treaty may have become a foreign country, and ceased to be a part of the realm; but the undoubted British parentage both of the memorialist and his father, should, under the statutes, redeem them from the consequences of being born within it, and save to them the privileges of British subjects."—MS.

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decision" (to use the language of the eminent persons last alluded to), "appear to have been—1st, that the treaty by which Great Britain recognised America as an independent and sovereign state, was an effectual renunciation on either side of the right to and duty of allegiance from the inhabitants of the United States; and, 2ndly, that native Americans, who, being resident in America at the time of the treaty, continued to reside there during the rest of their lives, manifested their intention of becoming American citizens, and must be considered as having renounced the character of British subjects from the period of the treaty. These principles," (they continue), "afford, in our judgment, a plain and convenient rule for the settlement of an embarrassing question; and we are therefore of opinion, that this rule will be adhered to by the House of Lords whenever the question shall be brought before them. An additional reason for attributing this effect to the treaty is furnished by the fact, that the American Courts have adopted the same rule in deciding upon the claims of British subjects to lands in America." To this opinion, which is of the greatest weight, may be added that of Mr. Chancellor Kent, whose Commentaries on American Law have acquired so deserved a reputation. "The sound and prevailing doctrine now is," says he, "that, by the treaty of peace of 1783, Great Britain and the United States became respectively entitled, as against each other, to the allegiance of all persons who were at the time adhering to the governments respectively; and that those persons became aliens in respect to the govern-

ment to which they did not adhere. This," he adds, " is the meaning of the treaty of 1783, and it put an end to all conflicting and double allegiance growing out of the revolution (*a*)." In connexion with this subject it is important to remark, that the *heirs and assigns* of every American who held lands in Great Britain at the time mentioned in the statute 37 Geo. 3, c. 97, viz. the 28th of October, 1795, are, by force of that act, (which legalised the provisions of the treaty of peace), *as far as regards those lands*, to be treated, not as aliens, but as native subjects (*b*).

The heirs and assigns of every American who held lands in Great Britain in 1795, are as far as regards those lands, to be treated as native subjects.

Treaty of Peace, art. 9, 37 Geo. 3, c. 97, s. 24.

XXVIII. When an alien has been naturalized, which can only be by act of parliament, he becomes to all intents a natural subject, and can inherit as if he had been born within the King's allegiance (*c*). And hence, too, a son or brother, though born *before* the act of naturalization, is capable of being his heir (*d*). But denization, which is usually by letters patent, confers only the privileges of a natural subject *a parte post*. Hence, a son born before the date of the letters, having in him no inheritable blood, would be excluded from the inheritance by his younger brother, if born after denization (*e*). And if the father be a subject born, and his son an alien, though he be made a denizen, he cannot inherit to his

Effect of naturalization and of denization.

One naturalized is privileged *a parte ante*; one idenized, *a parte post*. Bacon, v. 118.

(*a*) Kent's Comm. ii. 60, 3rd edit. (New York, 1836).

(*b*) *Sutton* v. *Sutton*, 1 Russ. & Myl. 663.

(*c*) Co. Litt. 129. a.; Com. Dig. tit. Alien (B 2), i. 542.

(*d*) Co. Litt. 129. a.; Com. Dig. tit. Alien, ut sup.

(*e*) *Per* Sir John Leach, M.R. in *Fourdrin* v. *Gowdey*, 3 Myl. & K. 402; Com. Dig. tit. Alien (D 2).

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father (*a*). So, if one, being a subject born, has issue two aliens, who are "idenized," and the one dies without issue, the other cannot inherit to him (*b*). According to the common law, if the grandfather were a subject born and the father an alien and made denizen, and the latter died in the lifetime of the former, leaving a son, who was a subject born, he could not inherit to his grandfather, even though born after the denization of his father (*c*). It was enacted, however, by the stat. 11 & 12 Will. 3, c. 6, that all persons, being natural born subjects, may inherit and make their title by descent from any of their ancestors, lineal or collateral, although their father or mother, or their ancestor, through whom they derive their pedigree, were born out of the King's allegiance. But, by a subsequent statute, 25 Geo. 2, c. 39, it is provided, that no right of inheritance shall accrue, by virtue of the former statute, to any person whatsoever, unless they are in being, and capable to take as heirs, at the death of the person last seised; with an exception as to the case where lands shall descend to the daughter of an alien; which descent shall be devested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule of descent.

11 & 12 Will. 3, c. 6.

25 Geo. 2, c. 39.

Persons attainted.

XXIX. Again; according to the common law, an attainted person could neither inherit lands, nor

(*a*) Com. Dig. ut sup., citing 1 Vent. 419; Co. Litt. 8. a.

(*b*) 1 Vent. 419.

(*c*) Com. Dig. tit. Alien, ut sup.; 1 Vent. 419.

transmit them to his children; neither could he be the medium of descent to his posterity from a remoter ancestor. Even if pardoned by the crown, a son born before the attainder, or after and before the pardon, could not inherit; for the corruption of the blood could not be purged by the King's charter, but only by act of parliament (*a*). It was enacted, however, by the statute 54 Geo. 3, c. 145, that no attainder for felony, save and except in cases of the crime of high treason, or of the crimes of petit treason or murder, or of abetting, procuring, or counselling the same, shall extend to the disenheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders during his, her, or their natural lives only; and that it shall be lawful for every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been made, to enter into the same. And by the 3 & 4 Will. 4, c. 106, s. 10, it is enacted, that when the person from whom the descent of any land is to be traced shall have had any relation, who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such

Corruption of blood.

54 Geo. 3, c. 145.

3 & 4 Will. 4, c. 106, s. 10. After the death of a person attainted, his descendants may inherit.

(*a*) Co. Litt. 8. a., 391. b.; Com. Dig. tit. Descent (C 13), iii. 422. Attainder, however, did not incapacitate the attainted person from taking by descent as heir in tail: nor did the consequent corruption of blood in the line of entail disqualify the issue in tail from succeeding. Prest. Abs. iii. 395, 396.

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land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted; unless such land shall have escheated in consequence of such attainder before the first day of January, one thousand eight hundred and thirty-four.

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Of Title by Alienation.

Alienation defined.

XXX. Having in the foregoing section treated of title by Descent, which is by act of law, we come now to consider the subject of title by Alienation; under which may be comprised any method wherein estates are voluntarily resigned by one man, and acepted by another; whether that be effected by sale, gift, marriage settlement, or devise (*a*), or by any other lawful act inter vivos, conformable to the

(*a*) Bla. Com. ii. 287. The term "purchase," when technically used, is not confined to those cases only where there is a bargain and sale, according to the popular and limited import of the word; but it extends to every kind of lawful acquisition by *act of party;* being thus distinguished from descent which results only from act of law. Hence, if an estate is obtained either by deed or will, this is by purchase. Litt. § 2; Co. Litt. 18. b.; *Dennett* v. *Pass*, 1 Bing. N. C. 388. If, indeed, one acquired the same estate by will which he would have inherited in case of his ancestor's intestacy, then, before the stat. 3 & 4 Will. 4, c. 106, s. 3, he would have taken by descent, and not by purchase. It is now, however, enacted, that when any *land*, [vide Sect. 2, art. 11, n], shall have been devised by any testator who

local law of the country in which the land is situated (*a*). To enter fully, however, into this inquiry, would be to anticipate what may be much more appropriately discussed in the Second and Third Books of this Essay: I shall therefore content myself with offering in the present section such miscellaneous observations on this head as have a more particular reference to Abstracts of Title, the proper subject of this book.

Period for which a title ought to be shewn.

XXXI. And first, as to the period for which a title ought to be shewn. It has long been an established rule among conveyancers, grounded, it is supposed, on the bar created by the stat. 32 Hen. 8, c. 2, and 21 Jac. 1, c. 16, to require the production of a good title, extending over a period of at least sixty years. There is little doubt, however, that though this bar most probably *suggested* the rule, it does not *alone account* for it: and if the broad distinction between the *cause* of a rule and the *occasion* of it had been borne in mind, the recent stat. 3 & 4 Will. 4, c. 27 (*b*), which fixes the ultimate period of limitation at forty years, could hardly have given rise to any difference of opinion in regard to its operation on this rule. It is clear that the remedies of persons entitled in remainder after estates for life, could not

Origin of the rule requiring a sixty years' title.

shall die after the thirty-first day of December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent.

(*a*) Vide Sect. 2, art. xxiii. ante, and Kent's Com. ii. 440, note.

(*b*) See Appendix to Book I. of this Essay, where the statute is given at length.

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be barred by any wrongful ownership while such particular estate continued, notwithstanding the period of sixty years might have elapsed (*a*). And, in this respect, the new law effects no change. According to Mr. Brodie's opinion (*b*), suggested apparently, though certainly not justified, by Mr. Tyrrell's remarks on this subject (*c*), the technical rule we are

Mr. Brodie's opinion that the rule was framed with reference to the duration of life, considered.

(*a*) *Doe* d. *Cook* v. *Danvers*, 7 East, 299; Runnington on Eject. App.

(*b*) "It is a common notion that the present length of abstracts is with reference to the limitation of sixty years. This is quite a mistake, it is with *reference to the duration of human life;* and so long as the law will not allow a remainderman expectant on an estate for life to be barred by a possession adverse to the tenant for life, a purchaser will be entitled to require a title to be shewn for the same period as heretofore under the old law." See Mr. Hayes's "Short Introduction to Conveyancing," App. No. 9.

(*c*) When examined by the Real Property Commissioners, Mr. Tyrrell was asked, "Are you prepared to state to what extent you think the present length of abstracts is occasioned by the statutes of limitations?" Mr. Tyrrell.—"The extent to which the present length of abstracts is occasioned by the statutes of limitations is not so great as it is frequently supposed to be; the longest period of limitation is the foundation of the rule, that a title must be shewn in every case for at least sixty years: but there are usually other causes which render it necessary that the abstract should commence at a more distant period; of these the principal are the equitable doctrine of notice, and the dangers arising from remainders after estates tail. The rules of equity, that notice of an instrument is notice of all its contents, and that a purchaser at any distance of time shall be liable to a trust of which he may have received notice, render it necessary to require the production of every deed or will which may be recited or noticed in a subsequent instrument; and under some circumstances, and particularly where there are covenants to produce title deeds or assignment of old terms of years, a chain of reference to prior instruments is kept up for centuries. The power of persons entitled to remainders after estates tail to obtain possession of the estate whenever the issue may happen to fail, obliges purchasers, who may ac-

considering was framed, not with reference to the limitation of sixty years, but with reference to the duration of human life; on the ground that the law will not allow a remainderman expectant on an estate for life, to be barred by a possession adverse to the tenant for life. This, indeed, may be a very

quire information that the estate has been entailed, to examine the settlement or will by which the remainders were limited, and the assurances by which they have been barred; and therefore, where notice of any estate tail is given by a subsequent deed, the abstract must commence with the instrument by which it was created. But if, as I have ventured to suggest, the doctrine of notice were abolished, the remedies in respect of remainders after estates tail were limited, and the period of limitation were reduced to twenty years, it would still be necessary to require evidence of titles for nearly sixty years, in order to guard against the danger of an absolute sale having been made by a person entitled only to an estate for life: wrongful ownerships are frequently created by tenants for life; a devise by a tenant to the curtesy is not an uncommon occurrence; and fathers who have possession of the deeds are able to suppress the settlement by which the limited nature of their interests would be discovered. I do not think that it would be practicable to limit the remedies of persons entitled in remainder after estates for life; and unless they are barred, the period during which a title must be proved, could not be materially shortened, because it must comprise the usual duration of life after a party has been competent to alien his estate. At present, the average time over which an abstract extends, may, I think, be considered to be a century; and I have stated my opinion to be, that it might be reduced about one half, if the period of limitation be reduced to twenty years, and were extended to remainders after estates tail, and the interference of equity on the ground of notice were prevented. In small purchases, where there have been several sales, proof of a title for about thirty years, might perhaps be deemed sufficient; and if a general registry were established, an abstract of the last twenty years, with a search to ascertain that no life estate has been created, which would remain undetermined, might generally be relied upon." Real Prop. Rep. App. i. 326.

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good reason why the period adopted should not be *less* than the usual duration of human life; but it can hardly alone account for the rule itself: for, that rule is too limited to denote the *extreme* duration of life, and the *mean* duration of life in England does not, in fact, exceed *thirty-six* years (*a*). And why should the right of a remainderman, expectant on an *estate for life* have been *exclusively* regarded?

Mr. Tyrrell's opinion as to the period for which a title should be shewn since the new act of limitation.

XXXII. With whatever view, however, the rule may have been framed, it is evident, (as Mr. Tyrrell remarks), that "until the remedies of persons entitled in remainder after an estate for life are allowed to be barred by wrongful ownership, while such particular estate continues, the period during which a title must be proved cannot be materially shortened," because it should comprise not merely the usual, but the *extreme* duration of life, after a party has become competent to alien his estate. And such too is the opinion of the Real Property Commissioners themselves. "Although a claim," they observe, "can seldom be set up after twenty years' adverse possession, the instances, however rare, in which this occurs, render all titles questionable to the extreme limit ever allowed; and

Opinion of the Real Property Commissioners, viz.— Sir J. Campbell, Mr. Tinney, Mr. Hodgson, Mr. Duckworth, Mr. Brodie.

(*a*) Par. Reg. Rep. App. p. 61—Mr. Finlaison's evidence; and see the table of the decrement of life in the Ency. Brit. xiv. 208, 7th edit. According to the Carlisle table of mortality, framed by Mr. Milne of the Sun Life Office, and which is believed to represent the average law of mortality in England, with very considerable accuracy, out of 10,000 persons born together, 4,000 complete their fifty-sixth year; and 2,894 attain to 66 years of age. M'Culloch's Comm. Dict. pp. 693, 718, 2nd edit.

upon the sale and mortgage of land, it is necessary that every title should be strictly examined for nearly a century, and that evidence should be given of the enjoyment, transfer, and devolution of the property during that long period. From the increased frequency with which real property changes hands in modern times, the length of abstracts is a growing evil which calls loudly for remedy; and we think some diminution of the evil will be produced by shortening and making uniform the period of limitation, although, to guard against the fabrication of fee simple titles by persons in possession under particular estates, it will still be requisite to investigate titles for a greater number of years than the period of limitation which may be prescribed" (*a*).

Sir E. Sugden's opinion, that, though it will often be necessary to call for an earlier title, yet the usual period will ultimately be forty years.

XXXIII. It seems, however, to be the opinion of Sir Edward Sugden, that, although it will often be necessary to call for the production of an earlier title, yet the usual period will ultimately be not sixty, but forty years. "A purchaser," says he, "before the late act of 3 & 4 Will. 4, c. 27, had a right to require a title, commencing at least sixty years previously to the time of his purchase; because the old statute of limitations could not in a shorter period confer a title. In *Paine* v. *Meller* (*b*), Lord Eldon was of opinion, that an abstract not going further back than forty-three years, was a serious objection. Even sixty years were not sometimes suffi-

(*a*) Real Prop. Rep. i. 41.

(*b*) 6 Ves. 349. See *Robinson* v. *Elliott*, 1 Russ. 599.

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cient. For instance, if it might reasonably be presumed, from the contents of the abstract, that estates tail were subsisting, the purchaser might demand the production of the prior title. The statutes of limitation could not in such a case be relied on; remaindermen having had distinct and successive rights, upon which at least the statute of James could only begin to operate as they fell into possession. So, if an abstract begin with a conveyance by a person, who is stated to be heir-at-law of any person, the purchaser may require proof of the ancestor's intestacy (*a*). But the law is altogether altered by the 3 & 4 Will. 4, c. 27, which limits the general time to recover to twenty years, with a saving of ten years for persons under disability; but not to exceed in any case forty years, although the ten years are not expired. The act allows no further time for successive disabilities, and makes the bar of the tenant, in fact, extend to all whom he might have barred. This," adds Sir E. Sugden, "will ultimately tend to shorten abstracts considerably; and in the result, forty years will *probably* be considered the proper period instead of sixty, for an abstract to extend over; but still cases must frequently arise where it will be necessary to call for an earlier title (*b*)."

Still necessary in many cases to deduce the title from a more distant period than even sixty years.

XXXIV. One of the principal causes why it will still be often necessary to deduce the title from a more distant period than even sixty years, is the

(*a*) As to this point, see Ch. iii. s. 1, *post.*
(*b*) Sugd. Vend. & Purch. i. 329.

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equitable doctrine of notice. It is a received maxim, that whoever acquires an estate with notice—whether actual or constructive—of any trusts to which such estate is liable, becomes in contemplation of equity a trustee, and bound to perform the trusts accordingly. And it is a rule, that "notice of any instrument is notice of all its contents." But, although the *recital* of a deed, *e. g.*, is constructive notice of its contents, "yet to say," observed Sir John Leach, V. C., "that a purchaser is not to complete his contract, unless he has the actual inspection of every deed of which he has constructive notice by recital, would lead to a practical inconvenience which would be manifestly absurd. In some families title deeds are preserved for centuries; and if the earliest of those deeds recites a former instrument, made five hundred years since, but not now existing, it would be absurd to say that a contract is not to be enforced against a purchaser, because that deed cannot be produced. There must of necessity, therefore, be some practical limit to the operation of this objection; and the true inquiry seems to be, in every case, whether the absence of the deed recited throws any reasonable doubt upon the title of the vendor. *Prima facie,* it is to be presumed, that the purchaser in the ancient conveyance had actual inspection of every deed recited, and was satisfied with their contents; and further, it is to be observed, that it is not probable that a vendor would recite deeds which afforded evidence against his title. When there is no circumstance to repel the general effect of these presumptions, and when the title

Notice of any instrument is notice of all its contents.

When the loss of a deed recited throws no rea-

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sonable doubt upon a title, fortified by sixty years' undisputed possession, the purchaser must complete his contract.

under the conveyance, which contains the recital, is fortified by sixty years' undisputed possession; I think it a good practical rule to hold, that the loss of a deed recited throws no reasonable doubt upon the title of the vendor, and that the purchaser must complete his purchase (*a*)."

Title depending on the destruction or determination of estates tail.

XXXV. Before the stat. 3 & 4 Will. 4, c. 27, such were the dangers arising from remainders after estates tail, (for the remainderman could recover whenever the entail was spent, *whatever period* had elapsed), that, as already hinted, it became necessary in all cases where the title depended on an estate tail, alleged to have been *barred*, to call for the production of the instrument creating the entail as well as the assurances barring it; though upwards of sixty years or even a century had expired. And if the entail were alleged to have been *spent*, it equally became necessary, in order to shew that the remainderman or reversioner was entitled, to produce the deed or will which created the entail, or at least to give some secondary evidence of its contents. It is now

(*a*) *Prosser* v. *Watts*, 6 Madd. 60. Mr. Humphreys states the rule to be—"Whenever a document is necessary for deduction of the title, a purchaser is bound to inspect it, and is therefore affected with notice, not only of its contents, but also of whatever facts it leads to, whether by recital, description of the parties, or otherwise; and this has been carried so far as to bind a purchaser, not merely to facts, but also to the construction placed by equity upon those facts." Humphreys on Real Property, p. 157. The doctrine of Notice is fully explained, with all its complicated distinctions, by Sir E. Sugden in his Vend. & Pur. ii. 276—302.

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enacted by the 3 & 4 Will. 4, c. 27, s. 21, that when the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period thereinbefore limited, which shall be applicable in such case, [the ultimate period of limitation being forty years,] no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

3 & 4 Will. 4, c. 27, s. 21, Where tenant in tail is barred, remainder-men, whom he might have barred, shall not recover.

And by s. 22, it is further enacted, that when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period thereinbefore limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred, shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

Possession adverse to a tenant in tail shall run on against the remainder-men, whom he might have barred.

It is then further enacted, by s. 23, that when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the

Where there shall have been possession, under an assurance by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance, if then executed,

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would have barred them.

receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail,) shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twenty years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

Title to advowsons.

XXXVI. Again, with respect to Advowsons, which were not subject to any limitation, it was formerly usual to require the title to be stated, not for sixty years merely, but for a period as extensive as possible. Advowsons, however, are now specifically provided for by the new statute of limitations.

No advowson to be recovered but within three incumbencies or sixty years.

By s. 30, it is enacted, that, after the 31st December, 1833, no person shall bring any quare impedit or other action, or any suit to enforce a right to present to, or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after such period as hereinafter is mentioned; (that is to say), the period during which three clerks in succession shall have held the same, all of whom shall have

obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years.

Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishopricks.

And by s. 31, it is provided and further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversly to the right of presentation or gift of such patron as aforesaid: but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of the Act, be deemed a continuation of the incumbency of the clerk so made bishop.

Where person claiming an advowson in remainder, &c., after an estate tail, shall be barred.

It is then further enacted by s. 32, that in the construction of the Act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action, or suit, shall be limited accordingly.

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No advowson to be recovered after 100 years.

And by s. 33, it is provided and further enacted, that, after the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title.

Leasehold titles.

XXXVII. Leasehold titles do not fall within the rule above laid down; for, although a lease may be more than sixty years old, yet, unless there be an express stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the *lessor's title* to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity (*a*). "The true ground," to use the language

Implied undertaking in every contract for sale of a lease to make out lessor's title to demise, as well as that of the vendor to the lease itself.

(*a*) *Souter* v. *Drake*, 5 Barn. & Ad. 992: *Purvis* v. *Rayner*, 9 Pri. 488.

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of the Court in *Souter* v. *Drake*, "of refusing relief by a specific performance where the lessor's title to demise is not established is, that the vendor *by his contract* was bound to make out a good title in all respects to the subject agreed to be sold, including the right of the lessor to demise, and that he had not done so. If that is his *contract* he must equally fail in a Court of law, unless he can prove a performance of it on his part. And no reason occurs to us why, as the Courts of law and equity would put the same construction on a contract for the sale of a freehold estate, they should do otherwise in respect of a contract for sale of a leasehold."

Cessante statu primitivo cessat derivativus.

The reason for requiring the production of the lessor's title to demise, (apart from all question of contract), is sufficiently obvious. He might be tenant for life only, and yet have attempted to grant a lease for five hundred years; or he might have assumed a power, which he did not possess, of appointing for such or any other term; or even, assuming that he had an estate commensurate with the interest alleged to be created, yet such estate might be in mortgage; and the lease of a mortgagor, even if in possession, binds not the mortgagee (*a*).

Original lease and all mesne assignments ought in general to be produced.

XXXVIII. Although it be stipulated in the conditions of sale that the vendor shall not be bound to

(*a*) *Keech* v. *Hall*, Dougl. 21; *Thunder* v. *Belcher*, 3 East, 449; *Birch* v. *Wright*, 1 T. R. 378; *Doe* d. *Roby* v. *Maisey*, 8 Barn. & Cr. 767; *Pope* v. *Biggs*, 9 Barn. & Cr. 245; and see *Costigan* v. *Hastler*, 2 Sch. & Lef. 160.

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produce and prove the lessor's title to demise, as is now commonly the case, still it is of course necessary to begin the deduction of title with the *original* lease; and all mesne assignments ought in general to be produced. In some cases this cannot be done; and when there is evidence of uniform possession for a considerable time conformably to the ownership under the lease, a willing purchaser will often relax the rule. Thus, in the neighbourhood of the Metropolis, there are several estates held for residues of long terms of years, some of which were created in the reign of Queen Elizabeth; and the deeds creating the terms with the early assignments cannot be found:—in these cases, if the abstract of the instruments in existence sets forth a good title of forty years, it is considered in practice as unobjectionable (*a*). Every case, however, of this nature must depend on its own particular circumstances; for it cannot be laid down as a general rule that where the lease or any of the mesne assignments have been lost, the purchaser may safely waive all objections on this ground, not even if they would afford no obstacle to his recovering the land in an action at law (*b*).

Episcopal and other ecclesiastical leases.

XXXIX. Episcopal leases, however, (and the same remark is equally applicable to the leases of other

(*a*) Tyrrell, Real Prop. Rep. App. i. 327.

(*b*) Sugd. Vend. & Pur. i. 338; Prest. Abs. i. 11. All real and mixed actions, except for dower, quare impedit, and ejectment have been abolished by the stat. 3 & 4 Will. 4, c. 27, s. 36.

ecclesiastical bodies) are not governed by the same rules as those granted by private persons; for the right of a Bishop to demise, depends not on title, technically speaking, but on the statute law of the land. The principal points to be attended to are, 1st, that the estate demised is annexed to the see; and, 2ndly, that the leases, (for there is commonly a succession of them granted to the same person or his representatives), are conformable to the provisions of the statute law. In proof that the land belongs to the bishopric, no other evidence need be given than that which is afforded by the leases themselves, authenticated by the episcopal seal; for it is not to be supposed that a public functionary has either fraudulently put his seal to a public instrument, or acted under a mistake; and thus granted what does not belong to the see (*a*). Where there has been a succession of leases, such of them as have been made within the last fifty or sixty years ought at least to be produced and abstracted (*b*). SECTION 3.

It is the practice, too, in regard to leases by *lay* corporations, who have *notoriously* been the owners of the property demised for a very considerable period, not to require any evidence of title beyond that of the lessee (*b*). Lay corporation leases.

XL. With respect to *renewable* leases, there is a peculiar difficulty which often proves fatal to the title. Most public bodies upon renewing an old Renewable leases.

(*a*) *Fane* v. *Spencer*, 2 Madd. 238; 1 Meriv. 430, n.
(*b*) Prest. Abs. i. 14; ii. 8.

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lease, require it to be given up; and as each successive lease is alleged to be made in consideration of the surrender of the one preceding it, a purchaser is commonly held to have notice of such surrendered leases, even though he cannot by any means obtain possession of them. (Vide Art. XXXIV.) And if the vendor cannot produce them so as to satisfy a purchaser that they disclose no trust which in equity would be considered to "affect his conscience," the title is deemed to be unmarketable (*a*). It has been doubted, however, by a late eminent conveyancer, whose opinion is now before me, whether there is any just foundation for the practice which has prevailed of treating titles under renewable leases as defective if a chain of leases back to a remote period cannot be produced. That practice, he observes, originated with the case of *Coppin* v. *Fernyhough* (*b*), a case which certainly does not bear out the proposition; for the decision against the mortgagee proceeded on the ground that he might by proper inquiry have obtained a knowledge of the plaintiff's title contained in the lease which referred to the will; and which lease must have been in existence and accessible, as it was in evidence in the cause. It may too be inferred from the cases of constructive notice that the ground of the doctrine is that notice shall be presumed wherever there was enough to put the party upon enquiry, and the circumstances were such that enquiry would have led to a

Practice of considering title to renewable leases unmarketable, doubted.

(*a*) Sugd. Vend. & Pur. i. 339; Prest. Abs. i. 16.
(*b*) 2 Bro. C. C. 291.

knowledge of the fact. And the cases, he continues, negative the injustice of fixing one with constructive notice where by no activity of his own, he could have arrived at the fact: as in the case of a *suppressed* settlement (*Jackson* v. *Rowe*) (*a*), where Sir John Leach, V. C., well expressed the doctrine to be, that "he must be fixed with all the knowledge which it was reasonable he should acquire." Now, where is the difference, for this purpose, between a suppressed deed and an impounded deed, which the party in whose custody it is will not allow to be inspected; and where neither the want of possession of that deed by the vendor or mortgagor, nor the presumable contents of it, raise any ground for inferring a title in another? And how would it be possible, without a violation of every intelligent principle, to fix a person with constructive notice of the contents of deeds not essential to his title, and which, after application to the proper quarter, he was not permitted to inspect? (Vide Art. XXXIV.)

Tenant right of renewal or kindlie.

XLI. Leases are sometimes renewed on the ground of what in Scotland is appropriately termed "kindlie" (*b*), and in England a tenant-right; and although this right does not beget any corresponding obligation on the part of the lessor or lord, yet it is considered to give the tenant an ulterior interest beyond

(*a*) 2 Sim. & Stu. 472. See also the late case, *Cosser* v. *Collinge*, 3 Myl. & K. 283, before cited, Ch. i. s. 1, art. v. p. 50.

(*b*) See Dr. Jamieson's Scottish Dict. in verb.; and Mr. Ross's Lectures on the Law of Scotland, ii. 479.

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his subsisting term. Precarious as such interest is, for it amounts to a mere *chance*, yet it is subjected in all respects to the same provisions as the most permanent property (*a*). Equity too has so far recognised the right of renewal, that if any one holding a *fiduciary character*, *e. g.* executor (*b*), trustee (*c*), guardian (*d*), or the like, avail himself of his position to obtain a renewal in his own favour, the Court will treat it as a graft upon the old lease, for the benefit of all persons interested therein. And where the renewal is obtained by one having only a *partial interest* in the old lease, *e. g.* tenant for life (*e*), mortgagee (*f*), joint-tenant (*g*), copartner (*h*), or the like, the same rule applies; neither is the rule relaxed where the renewed lease comprehends other property than what was originally demised; for in such a case all who were interested in the old lease will be entitled

(*a*) Bac. Abr. iv. 890, tit. Leases, (U); and see Mr. Hargrave's argument for the appellant in *Lee* v. *Vernon*, 5 Bro. P. C. 10, and Mr. Butler's note to Co. Litt. 290. b. n., 249, s. ix.

(*b*) *Luckin* v. *Rushworth*, 2 Ch.Rep. 113; Finch's Rep. 392; *Anon.* 2 Ch. Ca. 207.

(*c*) *Reech* v. *Sandford*, commonly called the *Rumford Market case*, Selw. Ca. Ch. 61; *Griffin* v. *Griffin*, 1 Sch. & Lef. 352; *Mulvany* v. *Dillon*, 1 Ball & B. 409.

(*d*) Bac. Abr. iv. 891.

(*e*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 209; *Randall* v. *Russell*, 3 Meriv. 195, 196; *Hardman* v. *Johnson*, Ib. 347; *Taster* v. *Marriott*, Ambl. 668; *Raw* v. *Chichester*, Ib. 715; 1 Bro. C. C. 198, n.; *Pickering* v. *Vowles*, Ib. 197; *Owen* v. *Williams*, Ambl. 734; 1 Bro. C. C. 199, n.

(*f*) *Fitzgerald* v. *Rainsford*, 1 Ball & B. 37, 46; Bacon's Abr. iv. 891.

(*g*) *Ex parte Grace*, 1 Bos. & Pull. 376; *Killick* v. *Flexney*, 4 Bro. C. C. 161; *Palmer* v. *Young*, 1 Vern. 276.

(*h*) *Featherstonehaugh* v. *Fenwick*, 17 Ves. 298.

to the benefit of the renewal, so far as it concerns the property contained in the original lease (*a*). Nor will an underlessee for life, purchasing the interest of an immediate lessor, and obtaining from the superior lessor a renewal of the lease so purchased, be exempted from the ordinary rule (*b*). The same doctrine has been applied even to a *stranger*, who, to the prejudice of the old tenant, has *by undue means* obtained a renewal (*c*). It will not be irrelevant to add, that the principle is the same where the lease has expired, and the lessee become only tenant from year to year (*d*). Such being the "law of equity," it becomes important when investigating a title to renewable leaseholds, affected by kindlie or tenant-right, to ascertain that a good *equitable* as well as legal title is deduced (*e*).

Title under Crown grants.

XLII. If the title depends on a grant from the Crown, it then becomes necessary to require the production of the *original* grant, or at least an official and verified copy of it, in order to ascertain what was the *consideration* of the grant, and the *estate* granted; for if it amount to an estate tail only given for ser-

(*a*) *Giddings* v. *Giddings*, 3 Russ. 241, 257.

(*b*) *Giddings* v. *Giddings*, ut sup.

(*c*) *Parker* v. *Brooke*, 9 Ves. 583; Bac. Abr. iv. 891.

(*d*) *James* v. *Dean*, 11 Ves. 383; 15 Ves. 236; *Randall* v. *Russell*, 3 Meriv. 190, 196. That the interest of a tenant from year to year is transmissible to representatives, see *Doe* d. *Shore* v. *Porter*, 3 T. R. 13; 6 T. R. 298; 11 Ves. 393; 15 Ves. 241.

(*e*) Prest. Abs. i. 16. For some further observations on the subject of tenant-right, see Book III. ch. iii. of this Essay, and Recital Book, App. (E).

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vices rendered to the Crown, then by the 34 & 35 Hen. 8, c. 20, no recovery could bar either the issue in tail, or the reversion, so long as it remained in the Crown; nor can this now be done by force of the power of disposition given by the stat. 3 & 4 Will. 4, c. 74, for that act expressly excepts (§ 18) from its operation such tenants in tail as are within the statute of Henry. Even at common law, a reversion or remainder vested in the Crown could not under any circumstances be barred (*a*); but this inconvenient prerogative, with the exceptions just mentioned, has been recently abolished (*b*). Besides, the new Statute of Limitations, though it introduces, as we have already remarked (Art. XXXV.), some very useful provisions as to remainders and reversions expectant on estates tail, does not affect the Crown;

(*a*) Co. Litt. 372. b.; Prest. Conv. i. 18, 145; Prest. Abs. iii. 280.

(*b*) Stat. 3 & 4 Will. 4, c. 74, s. 15, which enacts that, after the thirty-first day of December one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, *including the King's most excellent Majesty, his heirs and successors*, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

for it is one of the king's prerogatives, that, when he is not expressly named (and he is not mentioned in this statute), the acts of the legislature do not bind him, at least where his estate or title is concerned (*a*). Another reason for requiring the production of the original grant, is that the Crown may have reserved to itself rents and services which if not extinguished by the warrant of the lord high treasurer or the commissioners of the treasury, under the authority of the stat. 3 & 4 Will. 4, c. 99, § 13, might form a serious objection to the title.

Title under fine or recovery of lands of the tenure of ancient demesne.

XLIII. With respect to an estate of the tenure of ancient demesne, it is important to observe, that, before the act 3 & 4 Will. 4, c. 74, if a fine or recovery had been levied or suffered in the court of Common Pleas, the effect was to change the tenure from ancient demesne to common socage *until* the lord reversed the fine or recovery by a writ of deceit. After reversal the ancient tenure was restored, and the fine or recovery rendered void, not only as to the lord, but also as to the parties, and all persons claiming under them. "Until the reversal, the parties were absolutely

(*a*) Bac. Abr. tit. Prerogative (E), s. 5; tit. Statute (I), s. 7. By the act 9 Geo. 3, c. 16, however, the King cannot recover upon a title beyond sixty years; but the operation of this act is very limited, because it does not extend to liberties or franchises, or to lands parcel of an honor, which has been put in charge within sixty years; and there are few lands which are not parcel of an honor, remaining in the Crown, and continuing in charge. Real Prop. Rep. App. i. 495; Prest. Abs. i. 31. As to being "in charge," see 4 Inst. 106.

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bound by the fine or recovery, and there was no method by which the lord could be compelled to bring his writ of deceit; and according to the prevailing opinion, there was no limit to his right to bring it; and the parties themselves could not rectify the error. Although a release from the parties would be effectual to extinguish their rights, yet, according to the better opinion, no subsequent fine or recovery could be levied or suffered in the lord's court, nor could the tenant claim any protection from the lord, or any right depending on the tenure, till the reversal of the fine or recovery in the court of Common Pleas; nor could the tenant have any effectual dealing with the lands as frank free, [*i. e.* common socage] till the lord had released his seignory. Therefore, till the reversal of the fine or recovery, or the release of the seignory, the title was unmarketable (*a*)."

3 & 4 Will. 4, c. 74. Fines and recoveries of lands in ancient demesne when levied or suffered in a superior court may be reversed as to the lord by writs of deceit, the proceedings in which were then pending, or by writs of deceit thereafter to be brought, but shall be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord.

It is now, however, enacted by 3 & 4 Will. 4, c. 74, s. 4, that no fine already levied in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no fine thereafter to be levied of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which were then pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such fine to be vacated only as to

(*a*) Real Prop. Rep. i. 29; Scriv. on Copyholds, ii. 706, and see Prest. Abs. i. 207, 304; (3rd edition).

the lord of the said manor, and every such fine which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid shall still remain as good and valid against and as binding upon the conusors thereof, and all persons claiming under them, as such fine would have been if the same had not been reversed by such writ of deceit as aforesaid; and no common recovery already suffered in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no common recovery thereafter to be suffered of lands of that tenure, shall upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which were then pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said nanor; and the court shall order such recovery to be vacated only as to the lord of the said manor; and every such recovery which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid shall still remain as good and valid against and as binding upon the vouchees therein, and all persons claiming under them, as such recovery would have been if the same had not been reversed by such writ of deceit as aforesaid.

Fines and recoveries of lands in ancient demesne levied or suffered in the manor court, after other fines and recoveries in a superior

And by s. 5, it is further enacted, that if at any time before or after the passing of this act a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior court, of lands of the tenure of ancient demesne, and subsequent-

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court, shall be as valid as if the tenure had not been changed.

ly to the levying or suffering thereof a fine or common recovery shall have been or shall be levied or suffered of the same lands in the court of the lord of the manor of which the lands had been previously parcel, and the fine or common recovery levied or suffered in such superior court shall not have been reversed previously to the levying of the fine or the suffering of the common recovery in the lord's court, then and in every such case the fine or common recovery levied or suffered in the lord's court shall, notwithstanding the alteration or change of the tenure by the fine or common recovery previously levied or suffered in the superior court, be as good, valid, and binding as the same would have been if the tenure had not been altered or changed; and that, in every other case where any fine or common recovery shall at any time before the passing of this act have been levied or suffered in a court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such court; and such court shall be deemed a court of sufficient jurisdiction for all the purposes of such fine or recovery: and in every other case where persons shall have assumed to hold courts in which fines or common recoveries have been levied or suffered, and such courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this act may have been levied or suffered in such unlawful or unauthorized courts shall not be invalid in consequence

Fines and recoveries shall not be invalid in other cases, though levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised.

of their having been levied or suffered therein, and such courts shall be deemed courts of sufficient jurisdiction for all the purposes of such fines or recoveries.

Tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, restored in cases in which the rights of the lord of the manor shall have been recognised within 20 years.

And by s. 6, it is further enacted, that in every case in which at any time, either before or after the passing of this act, the tenure or ancient demesne has been or shall be suspended or destroyed by the levying of a fine, or the suffering of a common recovery of lands of that tenure in a superior court, and the lord of the manor of which the lands at the time of levying such fine or suffering such recovery were parcel, shall not reverse the same before the first day of January, one thousand eight hundred and thirty-four, and shall not by any law in force on the first day of the then session of parliament be barred of his right to reverse the same, such lands, provided within the last twenty years immediately preceding the first day of January, one thousand eight hundred and thirty-four, the rights of the lord of the manor of which they shall have been parcel shall in any manner have been acknowledged or recognised as to the same lands, shall, from the said first day of January, one thousand eight hundred and thirty-four, again become parcel of the said manor, and be subject to the same heriots, rents, and services as they would have been subject to if such fine or recovery had not been levied or suffered; and no writ of deceit for the reversal of any fine or common recovery shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-three.

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Title to allotments under Inclosure Acts.

XLIV. It often happens that a title depends on an award made under some act of inclosure, and when this is the case, it is an established rule to require, not only the production of a good title to the allotment which is the subject of contract, but also to the estate or interest in lieu or in respect of which it was made; for though a change of property is effected, and sometimes even a change of tenure, yet the *title* (vide Introduction, Sect. 1, Art. III. n.), continues the same. Accordingly, if the title to the original estate be defective, the allotment in respect of it is in the same predicament: and hence the necessity of the foregoing rule. Sometimes one *entire* allotment is made in respect of estates held under *various* titles; and as the *whole and every part* of the allotment is subject to *all* the titles, no portion can be considered marketable unless *each* title is first established. Mr. Preston, in his treatise on Abstracts, mentions an instance in which it was reasonably computed that there must have been at least two hundred different abstracts, to shew the real state of the title (*a*). And here it may be remarked, that

(*a*) "A few years since," says Mr. Tyrrell, "a farmer, who became entitled to some land, which had been allotted in respect of an estate held under several titles, incautiously sold it, without a previous examination of his title, for 200*l.* The purchaser insisted that the seller was bound by the contract which he had entered into to make out a title. It appeared that a proper abstract and attested copies of the deeds, would cost at least 500*l.*; and the purchaser [who, to his shame be it spoken, was a professional man] with pretended generosity, relieved the seller from the loss to which he was liable, upon having the land conveyed for nothing! I think," adds Mr. Tyrrell, "that some Master in Chancery, or public officer, might be appointed to

though there is no change of title, yet there is sometimes a change of tenure; for unless otherwise directed by the act itself, every allotment is of common socage tenure or fee simple, even if made in respect of copyhold or leasehold lands (*a*). If there are several persons entitled, and the allotment is nominally made to one only, yet it will enure to the advantage of all (*b*).

Award must be conformable to the provisions of the Inclosure Act, and all statutory requisitions complied with.

XLV. When examining titles of this description, it is important to ascertain that the award was made in conformity to the provisions of the Act of Inclosure, and that all other statutory requisitions have been complied with. If the Act directs or requires the award to be enrolled within a given period, and the enrolment was made, not within, but *after* the time prescribed, a question then arises (and it has often occurred in practice), whether this is a fatal objection to the title. On the one hand, it has been contended that the usual clause as to enrolment is *directory* only, and not *conditional*, or essential to the validity of the award; and that where all the consequences of the act, such as the vesting of allot-

apportion any allotment, upon being satisfied, by the evidence of surveyors, of the value of the different parts of it, and of the different estates in respect of which it was made." Real Prop. Rep. App. i. 518. In certain cases, indeed, the Court will now authorize the Master to apportion allotments. *King* v. *Moody*, 2 Sim. & Stu. 579.

(*a*) *Doe* d. *Lowes* v. *Davidson*, 2 Mau. & Selw. 175; *Townley* v. *Gibson*, 2 T. R. 701; *Revell* v. *Jodrell*, Ib. 424; *Doe* d. *Sweeting* v. *Hillard*, 9 Barn. & Cr. 790.

(*b*) *Doe* d. *Sweeting* v. *Hillard*, 9 Barn. & Cr. 801.

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ments, extinguishment of tithes, &c., arise on the execution of the award, these cannot be counteracted by any such accidental irregularity as the one in question. On the other hand, it has been urged that non-enrolment within the time limited is the same thing as *omission* of enrolment; that the enrolment of the award is, in fact, as necessary as its execution; and that as without signing and sealing, so without enrolment, there can be no legal award. And such seems to have been the more prevailing opinion. It has, however, been enacted by 3 & 4 Will. 4, c. 87, s. 1, that every award already made and executed under or in pursuance of any act of inclosure, and which has not been enrolled, or which has not been enrolled within the time limited by the Act, under or in pursuance of which such award shall have been made, shall from the time of the execution of such award be as good and valid, and of the same effect in all respects as if such award had been enrolled in the manner, and within the time, if any, appointed and limited for that purpose in the act under or in pursuance of which the same has been made. And by s. 2, it is enacted, that where any award already made and executed under or in pursuance of any act of inclosure, has not been enrolled, it shall be lawful for any person or persons, having or deriving title to any messuages, lands, tenements, and hereditaments under such award, at his, her, or their expense, to require and cause such award, with any maps or plans annexed or relating thereto, to be enrolled in any one of his Majesty's courts of record at Westminster, or by the clerk of the peace of the

Stat. 3 & 4 Will. 4, c. 87, for remedying certain defects in titles under Inclosure Acts.

Proprietors of lands may cause award to be enrolled.

county, riding, division, soke, or place in which the lands to which such award shall relate are situated, to the end that recourse may be had thereto by any person or persons interested therein, for the inspection and perusal whereof no more than one shilling shall be paid; and a copy of such award when so enrolled, or of any part thereof, signed by the proper officer of the court wherein the same shall be enrolled, or by the clerk of the peace for such county, riding, division, soke, or place, or his deputy, purporting the same to be a true copy, shall from time to time be made and delivered by such officer or clerk of the peace for the time being, or his deputy, to any person or persons requesting the same, for which no more shall be paid than threepence for every sheet of seventy-two words; and every award already made, whether enrolled or not, and every copy of such award when enrolled as aforesaid, or of any part thereof, signed as aforesaid, shall at all times be admitted and allowed in all courts whatsoever as legal evidence.

Copy of any award so enrolled, and signed by the proper officer, to be delivered to any person requiring it.

And by s. 3, it is further enacted, that if any commissioner shall be dead or incapable of acknowledging his award before such award shall be enrolled, the same award may be enrolled without the acknowledgment of such commissioner, on due proof being given that such award is the deed or instrument of such commissioner.

As to practice requiring acknowledgment of deeds.

It is further enacted by s. 4, that where any award already made and executed under or in pursuance of any act of inclosure, shall be deposited in any parish church, it shall be considered as in the cus-

As to the possession of awards when deposited.

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tody of the officiating minister and churchwardens for the time being of such parish church; and where any such award shall be in the possession of the lord of any manor to or for whom, or to or for any preceding lord of which manor, any allotment shall have been made under such award, or in the possession of the steward of such manor, it shall be considered as in the custody of the lord of such manor for the time being; and the steward shall, when required, deliver up the same accordingly; and the said minister and churchwardens, or lord, as the case may be, shall from time to time, upon the request of any person or persons interested in any allotment or allotments, or otherwise, under such award, cause the same to be produced for the inspection of such person or persons on being paid by him, her, or them a just and reasonable compensation for such production, and shall also cause the same to be produced for the purpose of being enrolled, or in any court of law or equity, or on any other occasion, for the purpose of being given in evidence, on being paid all just expenses.

Proprietors may require awards to be deposited in the church or with the lord of the manor.

And by s. 5, it is further enacted, that where any such award as aforesaid shall not be deposited in the parish church of the parish in which the lands to which such award shall relate are situated, and shall not be in the possession of the lord or steward of any manor to or for the present or any preceding lord of which manor an allotment shall have been made under such award, but shall be in the possession of any other person, it shall be lawful for any person or persons interested in any allotment or

allotments, or otherwise, under such award, to require the same to be deposited in the parish church of the parish in which the lands to which such award shall relate are situated, and the person in whose possession the same shall be, shall, on such request, deliver up the same to the minister and churchwardens for the time being of such parish church, for the purpose of being so deposited (*a*).

The foregoing act not *prospective* in its operation.

XLVI. The foregoing statute, it will be observed, is retrospective only in its operation, so that all awards made since the act received the royal assent (viz. 28th August, 1833), which labour under the defect above noticed, will still be objectionable. And as the objection has been recognised by the legislature, it must, in practice, be considered a substantial one.

Title under an enfranchisement.

XLVII. Again; if the title depend on an enfranchisement, it is requisite to produce and prove not only the copyholder's title, but also the title of the lord; for although it is unnecessary when purchasing an estate held by copy of court roll to look to the lord's title, because the copyholder claims by force of the custom (*b*); yet it is otherwise when the copyhold has been enfranchised; for the right to enfranchise depends not on custom, but either on the *estate* which the lord for the time being has in the manor, or on some *power* given him by act of

(*a*) Sect. 6 provides for the appointment of commissioners in cases where they have been neglected or omitted to be made.

(*b*) 4 Rep. 21; Co. Copyh. s. 34, p. 79.

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parliament or by a former owner of the fee. Hence, says Mr. Serjeant Scriven, "it behoves every copyholder who is desirous of enfranchising his estate, to satisfy himself that the lord is seised of the manor for an estate in fee simple, or, at all events, that a power has been reserved to him to grant the freehold and inheritance of the copyhold tenement, or that he is acting under some special authority created by act of parliament (*a*)." But even if a power has been reserved to the lord, yet it will still be necessary to prove that such power was well *created;* and this cannot be done otherwise than by shewing that the seisin originally raised was commensurate with the estate authorised to be created under the power (*b*).

Besides, if there existed any incumbrances on the freehold, they would, it is conceived, bind the enfranchised estate; and accordingly it is often advisable to create a term of years, with licence of the lord, out of the copyhold, *before* the execution of the enfranchisement, so that the possession, if necessary, may depend on the term (*c*). (Vide Book III. Ch. VIII.)

Title under an exchange or partition at common law.

XLVIII. Finally, if the title be held under an exchange operating at common law (and the same observation equally applies to a title under partition between coparceners), it is generally necessary to adduce a good title, not only to the estate received, but to the estate given in exchange; because in such an exchange there is an implied mutual warranty of

(*a*) Scriv. Copyh. i. 665, third edit.

(*b*) Sugd. Pow. i. 176; Gilb. on Uses, p. 127.

(*c*) Prest. Conv. iii. 541; Prest. Abs. i. 302.

title, with a right of re-entry for either party in case of eviction (*a*). If *each* party, however, has aliened his estate, the assignee in either case cannot avail himself of the warranty and right of re-entry; for both, as Lord Coke says, "run only in privity," or, in other words, bind only the exchanging parties and their heirs. But where one only has aliened, the other, if evicted, may re-enter on the land which he gave in exchange (*b*). The rule, however, requiring the production of both titles, does not generally apply to exchanges made under local acts of inclosure (*c*), nor does it affect exchanges made under the 4 & 5 Will. 4, c. 30; for that statute expressly enacts (s. 24), that the land which is given in exchange shall be exonerated and discharged from the uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances then affecting the same, and shall be and become subject to such and the same uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances, as affected the land taken in exchange at the same date; and the land so taken in exchange shall be exonerated and discharged from all uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances then affecting the same, and shall be and become subject to such and the same uses, trusts, powers, conditions, limitations and restrictions, charges and incumbrances as affected the lands given in exchange at the same time.

5 Will. 4, c. 30. Lands given in exchange to be exonerated from the uses affecting them at the time, and to become subject to such uses as affected the lands taken.

(*a*) *Bustard's case*, 4 Rep. 121.

(*b*) *Bustard's case*, ut sup.

(*c*) Touch. ii. 290, Prest. edit.

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After exchange, party not to be evicted.

And it is further enacted, by s. 25, that no person to whom any land shall have been granted or conveyed in exchange according to the provisions of this act shall at any time thereafter be evicted from the peaceable and quiet possession of such land by reason or in consequence of any person claiming right thereto through any title prior to that of, or through any defect of title in, the person by whom such land may have been granted or conveyed; but the act provides that it shall be lawful for the person claiming such right, to use, exercise, and enjoy all such and the same powers and remedies in trying his right to and in obtaining and recovering possession of the land which shall have been granted or conveyed in exchange as the person so claiming would in case this act had not been made have been enabled to use, exercise, or enjoy in trying the right to and recovering the possession of the land in exchange for which the same shall have been so granted or conveyed under the authority of this act (*a*).

(*a*) For some further observations on exchanges, see Book III. Ch. V. of this Essay.

CHAPTER III.

OF THE EVIDENCES OF TITLE.

SECTION 1.

Of Evidence of Title by Descent.

SECTION 1.

Seisina facit stipitem.

I. IT being an established canon of the common law that inheritances shall lineally descend to the issue of the person who last died *actually seised*, it is necessary, in order to establish a title by descent (except as regards any descent happening on the death of any one dying after the 1st day of January, 1834) (*a*), to prove the actual seisin of the ancestor; and for this purpose it must be shewn that he had possession of the estate, either by his own entry or that of a tenant for years, or by having received rent from a lessee of the freehold, or in case of incorporeal hereditaments, and of estates in reversion or remainder, by having exercised acts of ownership. (Vide Chap. II. s. 2, Art. XI.) According to the practice of conveyancers, an actual seisin may be proved by the production of leases or counterparts of leases,

Evidence of seisin of ancestor.

(*a*) 3 & 4 Will. 4, c. 106, ss. 2 and 11. See Ch. II. s. 1, Art. 11, p. 104, ante.

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rent-rolls, extracts from the assessments to the land tax or poor-rate, or by such other evidence as is sufficient to produce a strong presumption of actual seisin, though it may be inadmissible or inadequate to prove the fact in a court of law. It seems that under some circumstances assessments are *legal* evidence (*a*); but when made in the family name merely, they cannot prove the actual seisin of any particular person not specifically mentioned (*b*). It has been also held, that the declaration of a deceased occupier touching his *tenancy* is admissible in evidence of seisin, on the ground that such a declaration by one, who, being in possession, is primâ facie presumed to be owner in fee, is *against his interest:* thus affording the strongest reason for believing his declaration to be true (*c*). And on the same principle the entries in the books of a deceased collector of land-tax, stating the payment of a rate by the occupier of a particular house, have been admitted as evidence of his occupation at that time (*d*).

Intestacy of ancestor.

II. Having, then, (when necessary) established the

(*a*) *Doe* d. *Strode* v. *Seaton*, 2 Ad. & Ell. 171; 4 Nev. & M. 81.

(*b*) *Doe* d. *Stansbury* v. *Arkwright*, 2 Ad. & Ell. 182; 1 Nev. & M. 731.

(*c*) *Carne and Nicoll*, 1 Bing. N. C. 430; *Holloway* v. *Raikes*, 2 T. R. 55; *Peaceable* d. *Uncle* v. *Watson*, 4 Taunt. 16; 1 Cr. Mee. & R. 931. It cannot, however, be laid down as a general proposition, that "occupation" is primâ facie evidence of an ownership in fee. See Ch. II. Art. 1, p. 83, note.

(*d*) *Doe* d. *Smith* v. *Cartwright*, 1 Ry. & M. 62; 1 Car. & P. 218. On the subject of declarations and statements of deceased persons being evidence when made against their interest, see Phill. Ev. i. 255—259.

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actual seisin of the ancestor, the next step is to prove that he *died intestate* as to the property in question. If he died without having made any will, the letters of administration granted to his personal representatives will raise the presumption of his intestacy; or if he left a will, but without disposing of the estate alleged to have descended, this must be produced, or proper evidence given of its contents, even although the possession has been conformable to the fact of intestacy. (Vide Chap. I. s. 2, Art. XV.) In practice, the probate or grant of letters of administration is usually accepted as sufficient proof of the testator's or intestate's death; and in peerage cases, where better evidence cannot be given, the grant of letters of administration has been received for that purpose (*a*). The Courts, however, generally require more direct evidence of death (*b*), unless from the circumstances of the case better proof cannot be given (*c*). The parish register of a person's burial, if sufficiently identified, affords, of course, the most conclusive evidence of his death.

Evidence of intestacy and death.

III. Having proved the seisin, intestacy, and death of the ancestor, the next thing is to establish the *heirship* of his descendant. If, *e. g.* the person alleged to be heir claim as the eldest son, his *seniority* may be proved by an affidavit of some member of the

Evidence of heirship.

Seniority.

(*a*) Minutes of Evidence in the Banbury Peerage case, p. 120, and in the Killmorey case, p. 10. (Lincoln's Inn Library.)

(*b*) *Thompson* v. *Donaldson*, 3 Esp. 63; *Clay on* v. *Gresham*, 10 Ves. 289.

(*c*) *French* v. *French*, 1 Dick. 268.

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Legitimacy.

family; and to establish his *legitimacy*, it must be shewn that he was born in lawful wedlock or in due time afterwards. (Vide Chap. I. s. 2, Art. XXIII.) For this purpose the conveyancer is generally satisfied with the evidence afforded by the register of the marriage of the parents, and of the baptism of the son. But where the estate has descended with a peerage, and it appears from some authentic account that the heir took his seat in the House of Lords, the usual evidence of heirship is dispensed with; because the fact of heirship must have been first proved before the heir could take his seat among the peers.

Usual evidence of heirship dispensed with where estate descends with a peerage.

Parish registers.

IV. In substantiating a pedigree, it is important to bear in mind that parish registers prove only the time and place of marriage, the time and place of baptism, and the time and place of burial (*a*). If, therefore, the time or place of *birth* be recorded, that is not legal evidence of the fact, because to register it is not the duty of the minister (*b*). Parish registers are considered by the Courts in the light of records, and a verified copy is admissible in evidence (*c*). And the same rule appears to apply to

(*a*) In *Doe* d. *Wollaston* v. *Barnes*, 1 Mood. & Rob. 386, it was contended that an examined copy of the registry of a marriage was insufficient, except in matters of pedigree, to prove the *time* of such marriage; but Lord Denman overruled the objection. For an interesting historical account of Parochial Registration, see the Report from the Select Committee, pp. 3—5.

(*b*) *Wihen* v. *Law*, 3 Stark. N. P. C. 63; *Rex* v. *Clapham*, 4 C. & P. 29; *Rex* v. *North Petherton*, 5 Barn. & Cr. 508; *Burghart* v. *Angerstein*, 6 C. & P. 690; *Duins* v. *Donovan*, 3 Hagg. 301.

(*c*) *Birt* v. *Barlow*, Dougl. 174.

the transcripts deposited with the diocesan records in conformity to the statute 52 Geo. 3, c. 146 (*a*). But in questions of peerage, the *original* register, or, if that cannot be produced, the transcript deposited with the bishop, is generally required (*b*). In the *Gardner Peerage case*, however, this rule was not adhered to. To prove the marriage of Lord Gardner at Madras, a book brought from the secretary's office, in the East India House, and containing a list of marriages and burials at Madras, authenticated by the signatures of the officiating clergymen, was produced. It appeared in evidence that this book consisted of separate sheets, *copied* from the original register in India, and transmitted from time to time to the East India House. Upon its being shown that the list containing the entry of Lord Gardner's marriage was in fact transmitted from India, (and this was principally proved by the accompanying dispatch of the secretary to the government), and that the clergyman whose name was affixed thereto did at the time when the alleged marriage was solemnised, officiate at Madras, the marriage was considered as proved (*c*).

(*a*) See *Walker* v. *Countess of Beauchamp*, 6 C. & P. 552. See the observations of Lord Eldon, on the great danger of relying altogether upon *copies* of registers. *Walker* v. *Wingfield*, 18 Ves. 445.

(*b*) Minutes of Evidence in the Marchmont Peerage case, p. 5, and in the Killmorey case, p. 10.

(*c*) Minutes of Evidence in the Gardner Peerage case, p. 15. It is stated that the lists of marriages and births in the book above-mentioned, extend as far back as 1709, p. 99. Mr. Le Marchant's Rep. p. 6, is not sufficiently explicit on the subject adverted to in the text, and this led Professor Amos to observe, in one

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Private registers.

There are various other sorts of registers recording births, marriages, or deaths; but not being considered as public documents coming from official custody, they are admissible in evidence, not as official records, but as mere private memoranda. Of this class are Fleet books (*a*), Guernsey registers (*b*), registers in an ambassador's chapel (*c*), and the registers of Dissenters (*d*) Quakers, and Jews.

Fleet books.

V. Even as mere private memoranda, the Fleet books ought to be received with the greatest caution. They were kept at various places about the Fleet prison by clerical persons of the lowest character, who, being *obliged*, probably, to live within the rules, carried on, in conjunction with the neighbouring victuallers, a sort of trade in what were then termed "divinity jobs." A curious contemporary account of

of his excellent lectures on proving pedigrees, that it does not appear clearly whether it was the original register. On examining, however, the Minutes of Evidence taken before the Committee of Privileges, I find it expressly stated that the document produced was a *copy* only of the register in India.

(*a*) *Read* v. *Passer*, 1 Esp. 213; 16 Ves. 59.

(*b*) *Huet* v. *Le Mesurier*, 1 Cox, 275.

(*c*) *Leader* v. *Barry*, 1 Esp. 353.

(*d*) *Ex parte Taylor*, 1 Jac. & W. 483; *Newham* v. *Rathby*, 1 Phill. 315; *Whittuck* v. *Waters*, 4 Car. & P. 375. It may be useful to add, that an arrangement was made by Lord Stowell and the present Archbishop of Canterbury, then Bishop of London, that persons residing abroad might transmit to this country certificates of baptisms, marriages, or burials, for the purpose of being deposited in the registry of the diocese of London: such documents, however, I apprehend, can be considered only as private memoranda.—See Parochial Registration Rep. p. 46, Mr. Shephard's evidence.

these famous marriage-mongers will be found in the note below (*a*). Most of the Fleet books were purchased by the government in 1821, and deposited in the Consistory Court of London. They contain original entries of marriages solemnised in the Fleet prison and rules thereof, from 1686 to 1754.

(*a*) "From an inspection into the several registers for marriages kept at the several alehouses, brandy shops, &c., within the rules of the Fleet Prison, we find no less than thirty-two couple joined together from Monday to Thursday last without licences, contrary to an express act of parliament against clandestine marriages, that lays a severe fine of 200*l.* on the minister so offending, and 100*l.* each on the persons so married in contradiction to the said statute. Several of the above-mentioned brandy-men and victuallers keep clergymen in their houses at 20*s.* per week each, hit or miss; but it's reported, that one there will not stoop to no such low conditions, but makes at least 500*l.* per annum of divinity-jobs after that manner. 'Tis pleasant to see certain fellows plying by Fleet-bridge to take poor sailors, &c., into the noose of matrimony, every day throughout the week, and their clocks at their offices for that purpose still standing at the canonical hour, though perhaps the time of day be six or seven in the afternoon." — Weekly Journal, 1723, June 29th, quoted in Burn's Fleet Reg. p. 12. Lord Hardwicke's Act (26 Geo. II. c. 33) put an end to the solemnisation of marriages at the Fleet, May Fair, and other places of the same kind, by enacting that any person solemnising matrimony in any other place than a church or chapel, without banns or licence, should, on conviction, be adjudged guilty of felony, and be transported for fourteen years. A gossiping account of the introduction of this act is given in Horace Walpole's Letters, edited by the late Lord Dover, and in his memoirs of the last ten years of the reign of Geo. II. A mode of evading the act was soon suggested; for it is stated, in the Gentleman's Mag. for 1760, p. 30, that, at Southampton, vessels were always ready to carry on the trade of smuggling weddings by transporting the couple to Guernsey, there to be married. The price of such a marriage was five guineas. — Burn's Fleet Reg. p. 19.

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Dissenters' registers.

VI. The principal registers of the Dissenters, including under this term the three denominations, viz. Presbyterians, Independents, and Baptists, was commenced at Dr. Williams's library, in Redcross-street, Cripplegate, in 1794, and has been continued up to the present time (*a*). This register having been much in use among the three denominations, obtained with them a high degree of reputation; so that when rejected in a court of law as being inadequate to prove the time of birth, not a little alarm was created among the Dissenters. In consequence of this, the deputies of the denominations laid the case, together with the forms of their registers, before several eminent counsel, including the present Chief Justice of the Common Pleas, Sir Nicholas Tindal, whose opinion was to the following effect (*b*):—"If the direction of the Chief Justice was, that the original certificate was altogether inadmissible in evidence, I cannot help thinking that such direction will be held to be wrong, and that the plaintiff will succeed in his motion; but if the direction to the jury was, that, under all the circumstances of the case, the original certificate was insufficient to establish the birth of the child, I cannot say that the plaintiff will succeed in setting aside the nonsuit, without knowing more accurately what other evidence was produced.

Sir Nicholas Tindal's opinion as to the admissibility of Dissenters' registers in evidence.

(*a*) The London registry of births and baptisms for the Wesleyan Methodists commenced in the beginning of 1818, and takes in the whole kingdom: but many persons have neglected to register their children. It is kept at the Metropolitan Registry Office, 66, Paternoster-row.—Parochial Registration Rep. p. 112, Mr. Cordeaux's (the registrar) evidence.

(*b*) Parochial Registration Rep. p. 79, Mr. Edgar Taylor's evidence.

I do not think the parties who consult me will be able, by any mode which they can devise, to put the register or the certificate upon the same footing as evidence in a court of justice, as that on which parish registers stand. The latter being made by a person whose public character is acknowledged by the law, in obedience to injunctions, which form part of the law of the land, being also the record of an event which takes place openly, and in the face of the whole parish, (for such ought baptism to be when regularly administered); being also open to the inspection of the whole parish, and being confirmed by a copy annually sent into the court of the diocesan, so as to secure it from any subsequent alteration, must have, both naturally and legally, a superior weight to the certificates prepared upon the system set forth in this case. In fact, as to one part of these certificates, (namely, that in which witnesses state they were present at the birth of the child), it would, upon general principles of evidence, be altogether inadmissible, being a mere declaration of a witness not upon oath. I do not therefore think the certificates or the registers would be received in evidence upon the same footing as a parish register; but inasmuch as the entry is signed by the parents, or one of the parents, I conceive the same to be evidence of the declaration of the parents that the child is theirs. An entry by the parents, or either of them, in any book, has always been held admissible evidence in a question of pedigree; and I think the entry upon the certificate would be entitled to more weight than the ordinary entry found in a Prayer-book, Bible, or

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other book or paper in which the parent may have been accustomed to enter the births of his family, because the entry is made more publicly and solemnly in the presence of persons who would detect any fraud or inaccuracy at the time it was made; up to the extent of such evidence, therefore, but not beyond it, I am of opinion that the original certificates are admissible testimony in courts of justice." The other opinions (*a*) were to the same effect.

Quakers' registers.

VII. The Quakers have for many years adopted very exact regulations for the registry of marriages, births, and burials; so that their registers may be safely relied on, though not strictly legal evidence. With respect to births, the rule of the society is,

"Birth-notes."

that two documents called "birth-notes" are to be properly filled up, inserting the father's occupation or other usual addition, and signed. Having passed a monthly meeting, one birth-note is given to the parties, and the other to the registrar, who, after entering it, forwards it with the notes received within the year, to the quarterly meeting, generally a county meeting, when they are placed in a proper

"Burial-notes."

book and indexed. "Burial-notes" must in like manner be prepared and passed; after which they are registered in the monthly meeting to which the

Marriage registers.

deceased belonged. With respect to marriages, two registers are to be made and delivered at the monthly meeting next occurring to which the woman

(*a*) The opinions alluded to were those of the present Master of the Rolls and Vice-chancellor.

belongs, to be there carefully examined; one of them is preserved in a book belonging to the monthly meeting, and the other forwarded to a quarterly meeting, to be fixed in the book kept for that purpose (*a*).

Jewish registers.

VIII. The jewish registers are kept at the various synagogues, but more exactly at the Great Synagogue, as it is called, in Duke's Place. The registry of marriages and burials are considered to be accurate, being made at the time by the person who officially attends. The register of births, however, is very imperfect; for as the naming and circumcision of the males often take place at the house of the parents, and the person by whom the ceremony is performed not being an officer of the synagogue, the registration is deferred, and often never takes place. As to the females, though they are named publicly in the synagogue, yet the officer does not then make any registry, but waits until the particulars are sent by the parents, who frequently neglect to do so. When no register of birth can be found in the synagogue, recourse must be had to the person who circumcised the child; for he always preserves an exact account of the performance of that rite (*b*).

IX. The acknowledged insufficiency of parochial and private registers for the purpose of proving pedigrees and for other national objects of importance,

(*a*) Par. Reg. Rep. p. 72, Mr. Pease's evidence.

(*b*) Par. Reg. Rep. pp. 23, 24, Mr. J. L. Goldsmid's evidence.

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combined with the notorious fact that they have been "often falsified, stolen, burnt, inaccurately inscribed, and carelessly preserved" (*a*), rendered it highly expedient that a national registration of births, marriages, and deaths, should be established; and accordingly the statute 6 & 7 Will. 4, c. 86, was passed for this purpose. The registrar, or his deputy, of each district, formed according to the provisions of this act, is required to inform himself carefully of every birth and every death which shall happen within his district (*b*) after the 1st day of March,

Stat. 6 & 7 Will. 4, c. 86, for registering births, deaths, and marriages in England.

(*a*) Par. Reg. Rep. p. 9. According to Sir Thomas Phillips, there is scarcely a parish in the kingdom which has not some deficiency or other. In one instance, he says, a question arose respecting the baptism of a gentleman who was baptized by the name of Anketil Grey, and on first searching the register where he was baptized, his name could not be found, and searches were made in various other registers in vain; but on re-examining the former register, he was found entered as *Miss Ann* Kettle Grey.—Par. Reg. Rep. p. 56.

(*b*) To ensure, if possible, an accurate account of both births and deaths, it is enacted by s. 19, that the father or mother of any child born, or the occupier of every house or tenement in England in which any birth or death shall happen, after the said first day of March, may, within forty-two days next after the day of such birth or within five days after the day of such death respectively, give notice of such birth or death to the registrar of the district; and in case any new-born child or any dead body shall be found exposed, the overseers of the poor in the case of the new-born child, and the coroner in the case of the dead body, shall forthwith give notice and information thereof, and of the place where such child or dead body was found, to the registrar; and for the purposes of this act the master or keeper of every gaol, prison, or house of correction, or workhouse, hospital, or lunatic asylum, or public or charitable institution, shall be deemed the occupier thereof.

And by s. 20, that the father or mother of every child born in England after the said first day of March, or in case of the death,

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Registers of births and deaths.

1837, and to learn and register as soon after the event as conveniently may be done, in one of the books provided for that purpose, the particulars required to be registered according to the forms prescribed by the act touching every such birth or every such death, as the case may be, which shall not have been already registered (*a*).

Marine register book.

In case of *English* subjects dying at sea on board of a *British* vessel, the captain or commanding officer is to make a minute of the particulars and forward a certificate of such minute to the registrar general, who is required to file the same and enter a copy thereof in a book

illness, absence, or inability of the father and mother, the occupier of the house or tenement in which such child shall have been born, shall, within forty-two days next after the day of every such birth, give information, upon being requested so to do, to the said registrar, according to the best of his or her knowledge and belief, of the several particulars hereby required to be known and registered touching the birth of such child.

It is also enacted, that some person present at the death or in attendance during the last illness of every person dying in England after the said first day of March, or in case of the death, illness, inability, or default of all such persons, the occupier of the house or tenement, or if the occupier be the person who shall have died, some inmate of the house or tenement in which such death shall have happened, shall, within eight days next after the day of such death, give information, upon being requested so to do, to the said registrar, according to the best of his or her knowledge and belief, of the several particulars hereby required to be known and registered touching the death of such person: Provided always, that, in every case in which an inquest shall be held on any dead body, the jury shall inquire of the particulars herein required to be registered concerning the death, and the coroner shall inform the registrar of the finding of the jury, and the registrar shall make the entry accordingly. Sect. 25.

(*a*) 6 & 7 Will. 4, c. 86, s. 18.

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to be kept for that purpose in the general register office, called the "Marine Register Book" (*a*).

Marriage registers to be kept in duplicate.

X. With respect to marriages, it is enacted, that every clergyman of the church of England, immediately after every office of matrimony solemnized by him, shall register in duplicate in two of the marriage register books furnished by the registrar general for that purpose, the several particulars relating to that marriage according to the form prescribed by this act; and every registering officer of the Quakers, as soon as conveniently may be after the solemnization of any marriage between two Quakers in the district for which he is registering officer, and every secretary of a synagogue, immediately after every marriage solemnized between any two persons professing the jewish religion, of whom the husband shall belong to the synagogue whereof he is secretary (*b*), shall register or cause to be registered in

(*a*) 6 & 7 Will. 4, c. 86, ss. 21 and 26.

(*b*) By s. 30, it is enacted, that the registrar general shall furnish to the rector, vicar, or curate of every church and chapel in England wherein marriages may lawfully be solemnized, and also to every person whom the recording clerk of the Society of Friends commonly called Quakers, at their central office in London, shall from time to time certify in writing under his hand to the registrar general to be a registering officer in England of the said society, and also to every person whom the president for the time being of the London committee of deputies of the British Jews shall from time to time certify in writing under his hand to the registrar general to be the secretary of a synagogue in England of persons professing the jewish religion, a sufficient number in duplicate of marriage register books, and forms for certified copies thereof.

duplicate in two of the marriage register books the several particulars relating to that marriage according to the prescribed form; and every such registering officer or secretary, whether he shall or shall not be present at such marriage, shall satisfy himself that the proceedings in relation thereto have been conformable to the usages of the said society, or of the persons professing the jewish religion, as the case may be; and every such entry (whether made by such clergyman or by such registering officer or secretary respectively as aforesaid), shall be signed by the clergyman or by the said registering officer or secretary, as the case may be, and by the parties married, and by two witnesses.

Duplicates and certified copies of registers of marriages to be sent to superintendent registrar.

And by s. 33, it is enacted, that the rector, vicar, or curate of every church and chapel in England, wherein marriages may lawfully be solemnized (*a*), and every such registering officer and secretary shall make and deliver to the superintendent registrar of the district, a true copy certified by him under his hand of all the entries of marriages in the register book kept by him since the last certificate, the first of such certificates to be given in the month of July, 1837, and to contain all the entries made up to that time, and shall keep the said marriage register books safely until the same shall be filled; and one copy of every such register book, when filled, shall be delivered to the superintendent registrar of the district, and the other copy of every such register book kept by any such rector, vicar, or

(*a*) See stat. 6 & 7 Will. 4, c. 85.

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curate, shall remain in the keeping of such rector, vicar, or curate, and shall be kept by him with the registers of baptisms and burials of the parish or chapelry within which the marriages registered therein shall have been solemnized; and the other copy of every such register book of marriages among the Quakers, and among the Jews respectively, shall remain under their care respectively, to be kept with their other registers and records, and shall, for the purposes of this act, be still deemed to be in the keeping of the registering officer or secretary for the time being respectively (*a*).

It is also enacted, that every registrar shall send to the superintendent registrar of his district certified copies of the entries of births and deaths; and, when any register book is filled, it is then to be delivered to the superintendent registrar, and kept by him with the records of his office. And all the certified copies of the registers of births, deaths, and marriages, received by the superintendent registrar, are to be sent by him to the registrar general, in whose office they are to be kept, so that they may be readily seen and examined (*b*).

Searches may be made, and certificates given by the persons keeping the registers.

XI. As to the right of searching the registers, it is enacted, that every rector, vicar, or curate, and every registrar, registering officer, and secretary, who shall

(*a*) This act, however, expressly provides that nothing therein shall affect the registration of baptisms or burials as now by law established, or the right of any officiating minister to receive the fees now usually paid for the performance or registration of any baptism, burial, or marriage.—Sect. 49.

(*b*) 6 & 7 Will. 4, c. 86, ss. 32 and 34.

have the keeping for the time being of any register book of births, deaths, or marriages, shall at all reasonable times allow searches to be made of any register book in his keeping, and shall give a copy certified under his hand of any entry or entries in the same, on payment of the proper fee (*a*).

Indexes to be made at the superintendent registrar's office, and persons allowed to search them.

It is also enacted, that every superintendent registrar shall cause indexes of the register books in his office to be made, and kept with the other records of his office; and that every person shall be entitled at all reasonable hours to search the said indexes, and to have a certified copy of any entry or entries in the said register books under the hand of the superintendent registrar, on payment of the proper fees (*b*).

Indexes to be kept at general register office, searches allowed, and certified copies given.

And again it is enacted, that the registrar general shall cause indexes of all the said certified copies of the registers to be made and kept in the general register office; and that every person shall be entitled, on payment of the fees, to search the indexes between the hours of ten in the morning and four in the afternoon of every day, except Sundays, Christmas-day, and Good Friday, and to have a certified copy of any entry in the said certified copies of the registers (*c*).

(*a*) Sect. 35. The fee fixed by the act is,—for every search extending over a period not more than one year, the sum of one shilling; and sixpence additional for every additional year; and the sum of two shillings and sixpence for every single certificate.

(*b*) Sect. 36. The fees are—for every general search, the sum of five shillings; and for every particular search, the sum of one shilling; and for every certified copy, two shillings and sixpence.

(*c*) Sect. 37. For every general search of the indexes,

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XII. The most important provisions, however, with reference to the subject of pedigrees, are those which relate to the admissibility of certified copies of entries as evidence of births, deaths, and marriages. It is enacted by s. 38, that all certified copies of entries purporting to be sealed or stamped with the seal of the general register office shall be received as evidence of the birth, death, or marriage, to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office shall be of any force or effect which is not so sealed or stamped.

Certified copies given at general registry office and sealed, to be evidence of births, deaths, and marriages.

It is also provided, that no register of births shall be given in evidence, to prove the birth of any child, wherein it shall appear that forty-two days have intervened between the day of the birth and the day of the registration of the birth of such child, unless the entry shall be signed by the superintendent registrar. And further, that no register of births, except in the case of children born at sea, shall be given in evidence to prove the birth of any child, wherein it shall appear that six calendar months have intervened between the day of the birth and the day of the registration of the birth of such child (*a*). It is also enacted by s. 28, that no register of birth or death, according to this act, shall be given in evidence which shall not be signed by some person professing to be the informant, and to be such party as the act re-

Births not to be registered after six months.

Register to be signed by the informant.

twenty shillings must be paid; and for every particular search, one shilling; and for every certified copy, two shillings and sixpence.

(*a*) Sections 22 and 23.

quires to give such information to the registrar. (Vide Art. IX. note.) SECTION 1.

XIII. Besides producing the register, or an examined copy of it, or, if from the general register office, a certified and sealed copy, it is generally necessary to "*identify*" it, that is to say, we must shew that the person whose birth, marriage, or death is to be proved, is the very person whose name appears in the register. Identity of name is not sufficient; identity of person must be proved (*a*). To establish this identity is often exceedingly difficult, especially when the name is one of common occurrence. When the person whose register is to be identified, lived in the same parish in which the register is found, this, if consistent with other circumstances, raises, in most cases, a presumption in favour of identity; and, if the description of paternity corresponds, and still more,

Identity of person registered must be proved: identity of name is not sufficient.

(*a*) *Birt* v. *Barlow*, Dougl. 162; *Draycott* v. *Draycott*, 12 Vin. Abr. 89, pl. 11. "The practice," said a late eminent conveyancer, "is by no means uniform, but the opinion I have always entertained is that a vendor is bound to connect the certificates produced with the parties named in the abstract by affidavit of identity." See Mr. Coventry's Conv. Evid. p. 278, where it is said, that "to prove the pedigree of an eldest son, certificates of the marriage of his parents, and of his own baptism, within a reasonable period of the marriage, are admitted by the conveyancer as full and ample evidence of the legitimacy, without any proof of the identity of the parties. If," he adds, "the certificates are from the registers of the parish where the parties reside, the presumption is, that the persons are the same as the names import; and it is only when there are several of the same name [which is very often the case] that any evidence of identity is required in practice."

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if to this be added the name of his trade or occupation, as is frequently the case in ancient registers, the identity will be easily proved (*a*). Mr. Amos mentions an interesting circumstance connected with the present subject, which will be best told in his own words. "I have," he observes, "been collecting some memorials of the celebrated Selden, which have never been communicated to the public; and this led me to search the parish register of the parish in which I knew he was born, and where the house in which he was born is now to be seen, with an inscription over the door, carved by himself when a boy. I find in the parish register of Salvington, near Worthing, 'John, the son of John Selden, *the minstrel.*' The identity of parish and christian name, and the circumstance that the date must be somewhere near the time of Selden's birth, were almost enough to satisfy me that I had hit the right entry; but when I found 'son of John Selden, *the minstrel,*' I immediately recognised my hero, for I recollected that when this illustrious character, to whom the constitution of this country is so deeply indebted, and whose learning was the admiration of Europe, was yet a young Oxonian, and was honoured by dining at Sir Robert Alford's table, some person asked the knight who was that remarkably acute lad at the bottom of the table? To which Sir Robert

(*a*) Owing to the various particulars of rank, profession, residence, &c. required to be registered by the stat. 6 & 7 Will. 4, c. 86, the difficulty of identifying parties under the new system of registration will be inconsiderable.

replied, 'he is the son of the *minstrel*, whose fiddle you hear in the hall (*a*).'" SECTION 1.

XIV. If registers do not contain the necessary proof, recourse may be had to secondary evidence; such as engravings on rings worn by members of the family, inscriptions on tomb-stones or coffin-plates, and entries by one of the family in bibles, missals, prayer-books, almanacks (*b*), or indeed in any other book; for, the *competency* of such evidence does not depend on the kind of book, in which the entries are made, though the *credit* to which it is entitled may be very much affected by that circumstance. Old pedigrees hung up in the family mansion (*c*), or found in the family archives (*d*), and even recitals in family deeds and wills have frequently been received (*e*). As a general rule, however, recitals are not evidence *for* the party making them, though they may be so Secondary evidence of pedigree.

(*a*) The interesting anecdote of Selden here given by Mr. Amos, is related by Aubrey, ii. 530; and Dr. Bliss has incorporated it in his excellent edition of Wood's Ath. Oxon. iii. 377.

(*b*) *Stanley* v. *Wade*, 1 Myl. & Cr. 338; *Kidney* v. *Cockburn*, 2 Russ. & Myl. 167; *Ryder* v. *Malbone*, cited in 2 Russ. & Myl. 169; *Vowles* v. *Young*, 13 Ves. 144; *Whitlocke* v. *Baker*, id. 514; 2 Str. 1151; *Herbert* v. *Tuckal*, T. Raym. 84; *Goodright* v. *Moss*, Cowp. 591; *Berkeley Peerage case*, 4 Camp. 401; Minutes of Evidence in the *De L'Isle Peerage case*, pp. 121, 122, 135.

(*c*) *Goodright* v. *Moss*, Cowp. 591.

(*d*) Minutes of Evidence in the *De L'Isle Peerage case*, p. 155; *Monkton* v. *Attorney-General*, 2 Russ. & Myl. 147.

(*e*) *Doe* d. *Johnson* v. *Pembroke*, 11 East, 505; 13 Ves. 514; Minutes of Evidence in the *De L'Isle Peerage case*, pp, 116, 127; Minutes of Evidence in the *Banbury Peerage case*, pp. 6, 117.

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against him (*a*); and whatever effect recitals may have against the parties to the deeds, they cannot, as against third persons, be any evidence of pedigree, at least in a court of law or equity (*b*). Still, if there be evidence that possession has followed and accompanied the pedigree, *that* is a strong circumstance to prove that the persons named in the recited pedigree did, in fact, fill the alleged character: and in practice such evidence is often deemed to be sufficient to prove an ancient pedigree. Each case, however, must depend on its own peculiar circumstances; for, how can any fixed rule be framed for what is always fluctuating?

Inquisitions, *post mortem.*

The principal means of proving ancient pedigrees are by old records, and inquisitions *post mortem*. "Perhaps," said Lord Erskine (*c*), "while the feudal tenures prevailed, with the ancient inquisitions, as inquisitions *post mortem*, opportunities of establishing pedigrees were afforded, much superior even to the modern means by the register of baptisms. The heads of families upon those occasions made solemn declarations, which were matter of record; and threw a great light upon questions of inheritance." It

(*a*) *Per* Taunton, J., in *Doe* d. *Pritchard* v. *Dodd*, 2 Nev. & M. 45; and see Com. Dig. tit. Testmoigne (B. 5.) vol. vii. 430; *Leinson* v. *Tremere*, 1 Ad. & Ell. 792; *Bowman* v. *Taylor*, 2 Ad. & Ell. 278. "The law of estoppel," said Mr. Justice Taunton, "is not so unjust or absurd as it has been too much the custom to represent. The principle is, that, where a man has entered into a solemn engagement by deed under his hand and seal, he shall not be permitted to deny any matter which he has so asserted." 2 Ad. & Ell. 291.

(*b*) *Fort* v. *Clarke*, 1 Russ. 604.

(*c*) 13 Ves. 143.

must not, however, be inferred from these remarks that inquisitions are decisive evidence. In the claim of Lord Powis, two inquisitions were produced expressly contradicting each other (*a*).

Parish books.

In some cases old *parish books* may afford evidence as private memoranda, in matters of pedigree. Thus the date of Caxton's burial was fixed by a charge of twenty pence for two torches and four tapers, used at his funeral, entered in one of the parish books of St. Margaret's, Westminster (*b*).

Herald's books.

Other sources of evidence are the ancient *books of the Herald's Office* and their *Visitation-books of counties* (*c*). In the *De L'Isle Peerage case,* a book called "The Earl Marshal's book" was offered in evidence, but the counsel were informed, that the house had made this distinction in receiving as evidence, books from the Herald's

(*a*) Minutes of Evidence in the *De L'Isle Peerage case*, p. 123.

(*b*) To the local historian, and even to the Political Economist, old Parish Books are often of great value. They frequently contain very curious entries. In one which I have lately examined, I find it stated, under the date of 1639, that the Churchwardens attended the Quarter Sessions, and treated the Justices with a quart of wine and sugar, which cost twelve pence; and in another place, that they bestowed upon the vicar and his wife a quart of wine and sugar, which cost ten pence. Under the date of 1646, there is an entry to the effect that a meeting was held by the thirty men of the parish, and it was ordered that no churchwardens should thereafter expend upon the minister, who should preach on exercise days, and themselves, more than three shillings and fourpence. The price of articles of husbandry is also stated with great particularity.

(*c*) See Evans's Pothier, ii. 163, and Phillips on Evid. i. 421. The first commission for visitation was issued in the twenty-first year of Hen. VIII. and the last in the second of James II.

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College;—that when those books contained the substance of the information obtained, in consequence of inquiries which were made under judicial authority when the heralds were in the habit of travelling round the country, and examining the witnesses, they are admissible in evidence, and had been produced in Committees of Privilege; but that, when this practice ceased, and the books were mere entries of that which parties had chosen to have registered, without any due authority being shown for the entry, they are inadmissible (*a*).

Hearsay evidence admissible in cases of pedigree.

XV. It remains to be observed, that, contrary to the usual policy of the law, "*hearsay*" evidence is admissible in cases of pedigree. "It is admitted," to use the language of Mr. Burke, "from *necessity*, to accommodate human affairs, and to prevent that which courts are by every possible means instituted to prevent, a failure of justice" (*b*).

To admit hearsay in pedigree, you must, by evidence *dehors* the declarations, connect the person making them with the family.

In admitting such evidence, however, the courts have laid down certain rules in order to guard against the danger of fabrication and falsehood, and which must be strictly observed. In an elaborate judgment recently delivered by Lord Brougham, this subject is very fully discussed. "To admit hearsay evidence in pedigree," observes his Lordship (*c*), "you must, by evidence *dehors* the declarations, connect the person making them with the family. But I cannot go the length of holding, that you must

(*a*) Minutes of Evidence in the *De L'Isle peerage case*, (13 April, 1826), p. 12.

(*b*) Burke's Works, xiv. 380.

(*c*) *Monckton* v. *Attorney-General*, 2 Russ. & M. 156.

prove him to be connected with both the branches of the family touching which his declaration is tendered. That he is connected with the family is sufficient: and that connection once proved, his declarations are then let in upon questions touching that family; not declarations of details which would not be evidence (*a*), but declarations of the nature of pedigree, that is to say, of who was related to whom, by what links the relationship was made out, whether it was a relationship of consanguinity or of affinity only, when the parties died (*b*), or whether they are actually dead;—every thing, in short, which is, strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family, by the declarations of deceased persons who, by evidence *dehors* those declarations, have been previously connected with the family respecting which their declarations are tendered."

XVI. "But is there no further restriction touching the subject matter, and touching the manner in which the declaration is made? Clearly there is, and nothing can be more satisfactory, or more consistent with good sense, or with legal principle and decided cases, than the summary of the doctrine given by Lord Eldon, in *Whitlocke* v. *Baker* (*c*). His Lordship there observes, that the admissibility of such evidence is founded upon the presumption that the words given in evidence are the natural effusion of

The words given in evidence must be the natural effusion of the party, upon an occasion when his mind stands even, without bias.

(*a*) *King* v. *Erith*, 8 East, 539. Russ. & M. 167.
(*b*) *Kidney* v. *Cockburn*, 2
(*c*) 13 Ves. 511.

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the party, upon an occasion when his mind stands even, without bias, to exceed the truth or to fall short of it. I entirely agree that the words must be the natural effusion of the party, and that, generally speaking, he must have no bias upon his mind. But even here there must be a limit. It will be no valid objection to such evidence that the party may have stood, or thought he stood (for that would equally bias,) *in pari casu* with the party tendering the declaration, and relying upon it for the purpose of his own contention; for, it has been decided, that, although the party deceased, whose declaration you are giving in evidence, was *in pari casu*, and, if he had been living, might have stood in the shoes of the party who tenders his declaration in evidence, that is not sufficient to exclude it. With the exception of what is said in *Drummond's case* (*a*), where the evidence was clearly inadmissible upon other grounds, I can find no warrant for asserting that if you tender the evidence of a man by way of hearsay in a case of pedigree (and of such cases only I am now speaking), that evidence is inadmissible when it comes from a person who stood *in pari casu* with the party tendering it. Lord Tenterden, in *Doe* v. *Turner* (*b*), states the law to be directly the other way, and he refers to a peerage case in the House of Lords, where the declarations of a deceased husband were given in evidence on the part of his son, although the husband was so far *in pari casu* with the claimant, that, if the son was entitled to the peerage, then, the hus-

(*a*) 1 Leach's Cr. Ca. 378. (*b*) 1 Ry. & Mo. 142.

band ought to have been a peer likewise. A stronger instance of similarity of situation than this can hardly be conceived, and the case certainly seems to go a great way. But, without pronouncing an opinion upon that decision, it is perfectly settled, both upon reason and authority, that the rule cannot be so far restricted as to exclude evidence, on account of the bias supposed to operate on the person making the declaration, in consequence of his being in the same situation, touching the matter in contest, with the party relying upon that declaration."

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XVII. "One restriction, however, clearly must be imposed: the declarations must be *ante litem motam.* If there be *lis mota,* or any thing which has precisely the same effect upon a person's mind with *litis contestatio* (*a*), that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind."

Hearsay declarations must be *ante litem motam.*

To these observations I shall only add, that the admissibility of hearsay evidence does not depend on its being of the *first degree.* The declarations tendered in evidence may either refer to what the party knew of his own knowledge, or, as is much more fre-

Hearsay evidence need not be of the first degree.

(*a*) "Not merely after the commencement of the suit, but after the dispute has arisen, that is the primary meaning of the word *lis.*"—Per Lawrence, J., in *Berkeley's case,* 4 Campb. 411. "I cannot help doubting," said the late Mr. Bell, "the opinion of the majority of the judges in the *Berkeley case,* as to rejecting evidence of what is said *post litem motam;* and, thinking that the weight due to it was matter rather to be left to a jury, I think it will be productive of much inconvenience." Real Prop. Rep. App. I. 246.

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quently the case, to what he had heard from others to whom he gave credit (*a*).

SECTION 2.

Of Evidence of Title by Alienation.

Of the legal evidence of the translation of property.

XVIII. In order to continue that exclusive right of property which was first acquired by personal occupancy, "the municipal law," says Sir William Blackstone, "has established *Descents* and *Alienations:* the former to continue the possession in the heirs of the proprietor after his *involuntary* dereliction of it by his death, the latter to continue it in those persons to whom the proprietor by his own *voluntary* act should choose to relinquish it in his lifetime. A translation or transfer of property being thus admitted by law, it became necessary that this transfer should be properly evidenced; in order to prevent disputes, either about the fact, as, whether there was any transfer at all; or concerning the persons by whom or to whom it was transferred; or with regard to the subject-matter, as, what the thing transferred consisted of; or, lastly, with relation to the mode and quality of the transfer, as for what

(*a*) *Monckton* v. *Attorney-General*, 2 Russ. & M. 165; *Athol* v. *Ashburnham*, Bull. N. P. 295; *Doe* d. *Futter* v. *Randall*, 2 Mo. & P. 20. The *dictum* in *Johnson* v. *Lawson*, 2 Bing. 88, that the Court will reject hearsay upon hearsay, or, as the learned judge expressed it, "hearsay two deep," is clearly not supported by authority.

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period of time, or, in other words, for what estate and interest the conveyance was made. The legal evidences of this translation of property are," he adds, "called the *common assurances* of the kingdom, whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed" (*a*). These common assurances are of four kinds: 1. By matter *in pais* or deed; 2. By matter of record; 3. By special custom; and 4. By will. They are also appropriately called *muniments*, à muniendo, quia muniunt et defendunt hæreditatem.

Common assurances of four kinds, 1. By matter in pais; 2. By matter of record; 3. By special custom; and 4. By will.

XIX. 1. With regard to assurances by *matter in pais* or deed, it is a general rule that they belong to the purchaser as incident to the land. Formerly, indeed, when charters of assurance usually contained a clause of warranty, there was this distinction; that where the vendor warranted the title, those charters or evidences which enabled him to have his warranty paramount, belonged not to the purchaser, who neither relied upon the title, nor undertook the defence of it, but to the vendor: it being reasonable that he

1. Assurances by matter *in pais*, or deed.

Title deeds belong to purchasers, as incident to the land.

(*a*) Bla. Com. ii. 293, 294. According to Termes de la Ley— "a book," said Mr. Justice Bayley, "of great antiquity and accuracy," (5 Barn. & Cr. 229)— "charters of lands are writings, deeds, evidences, and instruments, made from one man to another, upon some estate conveyed or passed between them of lands or tenements, shewing the names, place, and quantity of the land, the estate, time and manner of the doing thereof, the parties to the estate delivered and taken, the witness present at the same, with other circumstances."

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who was bound to render in value in case of eviction, should not be disarmed of the means to defend the title to the land. But if the vendor did not warrant the title, all the charters and evidences, whether they contained any warranty or not, belonged to the purchaser, although not granted to him by express words (*a*). These warranties, however, which involved much "curious and cunning," and very useless learning, have been almost universally superseded by covenants for title (*b*). The purchaser, too, has a right not only to the principal deeds and charters which relate to the *title* to the land, but also to those which are accessory, and concern only the *possession*, such as court rolls, counterparts of leases, &c. (*c*).

Right to title deeds, where the estate is sold in lots.

XX. But although it is a general rule that the

(*a*) *Lord Buckhurst's case*, 1 Rep. 1; Shepp. Abr. P. I. 327.

(*b*) "These, under the modern practice, are entered into by the grantor, on every occasion of an assurance for a valuable consideration (which presupposes a contract), whether on sale, marriage settlement, mortgage, or otherwise. In the instance of mortgage they are absolute, or extend against all rightful adverse claimants whatever; but on sales, marriage settlements, or other conveyances of the absolute interest, the practice is to confine them to the acts of the grantor, and of the preceding owners who have *not* entered into covenants for the title; of which negative description all persons dying seised, whether testate or intestate, necessarily are. The professed rule is, that there should be a chain of covenants throughout the title, connecting those of the alienor with those of the preceding owner, who has last covenanted." Humphreys on Real Property, p. 68.

(*c*) Shepp. Abr. P. I. 327; *Shore* v. *Collett*, Coop. 234. And see Ch. 1, s. 2, art. xiii. p. 66, ante.

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title deeds belong to the purchaser, yet where an estate is sold in lots, the practice is to give them to the purchaser of the most valuable portion of the property, upon which he is required to enter into a covenant for the production of them to the other purchasers (*a*). In the case of a mortgage, however, it is usual to insist on *all* the title deeds being delivered into the custody of the mortgagee, notwithstanding their relation to other property of greater value; for the deeds are considered to be a substantial part of the security; and to allow them to remain with the mortgagor, might, under some circumstances, be considered a badge of fraud. When this rule is departed from, the mortgagee ought to require the deeds to be deposited with some third person, who should give a written declaration of the purpose of such deposit.

Mortgagee entitled to all the deeds, notwithstanding their relation to other property of the mortgagor.

Precaution to be adopted when deeds are not delivered up.

XXI. Whenever the original title deeds cannot be delivered into the custody of the purchaser (and there is no express stipulation to the contrary), he is entitled, at the expense of the vendor, to attested copies of them,—at least of such of them as are necessary to set forth a good title according to the usual rule, with a covenant for the production of the originals (*b*). The original title deeds, how-

Right to attested copies.

(*a*) Real Prop. Rep. iii. 57. "Where the vendor," says Sir Edw. Sugden, "retains the deed by which the estate he is selling was conveyed to him (which is mostly the case when it relates to other estates), it seems advisable for a purchaser to require a memorandum of his purchase to be indorsed on such deed." Sugd. Vend. & Pur. i. 531.

(*b*) *Dare* v. *Tucker*, 8 Ves.

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ever, though not intended to be delivered up, must be produced to the purchaser's solicitor, in order to be compared with the abstract; and no prudent person, said Mr. Justice Taunton (*a*), will be content with less. (Vide Ch. I. s. 1, Art. 2). If the original deeds are either lost or destroyed, and that fact be clearly made out, then secondary evidence of their contents is admissible; but it must be proved that the original deeds were duly executed (*b*)

2. Assurances by matter of record.

XXII. 2. "Assurances by *matter of record*," says Sir William Blackstone, "are such as do not entirely depend on the act or consent of the parties themselves; but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another, or of its establishment, when already transferred" (*c*). Of this nature are private acts of parliament, fines, and common recoveries.

Acts of parliament.

With regard to the proof of private acts of parliament, they were originally required to be proved by a copy examined with the parliament roll; but to avoid this inconvenience, a clause was usually inserted, declaring that a copy printed by the King's printer should be evidence. It was then objected that, in such cases, it was necessary to prove that

460; *Boughton* v. *Jewell*, 15 Ves. 176; *Berry* v. *Young*, 2 Esp. 640, n.; *Barclay* v. *Raine*, 1 Sim. & Stu. 449; *Stevens* v. *Guppy*, 2 Sim. & Stu. 439.

(*a*) *Rippinghall* v. *Lloyd*, 5 Barn. & Ad. 753.

(*b*) *Bryant* v. *Bush*, 4 Russ. 1. As to secondary evidence of writings, see Phill. Evid. i, 454, 457.

(*c*) Bla. Com. ii. 314.

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the act produced was in fact printed by the King's printer; and, to meet this objection, it is now commonly provided that the act shall be deemed and taken to be a public act, and shall be taken notice of as such by all judges, &c., without being specially pleaded. When a private act, therefore, contains such a clause as this, it need not be proved either to have been examined with the parliament roll, or to have been printed by the King's printer (*a*).

When the title depends on an act of parliament, proof must be given that all the requisitions of the act have been complied with.

XXIII. Whenever a title depends on an act of parliament, whether public or private, evidence must be given to shew that all the requisitions of the act have been complied with. Thus, when a sale has been made by the commissioners under the general Inclosure Act for payment of expenses, it must be proved that six weeks' notice of the sale was given in the manner in which other notices are directed to be published by the Local Act, which usually requires certain advertisements to be inserted in the newspapers, and the notices to be affixed to the church door: accordingly, it is necessary to produce the newspapers, and an affidavit that the notices were duly put up (*b*).

Evidence where a sale has been made under the general Inclosure Act.

Evidence where a sale has been made under the Insolvent Debtors Act.

Again, (to cite another instance from Mr. Tyrrell's valuable work), when a sale has taken place under the Insolvent Debtors' Act, it must be proved that advertisements were inserted in the London Gazette and another newspaper, to give notice of the meeting

(*a*) *Woodward* v. *Cotton*, 1 Cr. Mees. & R. 44; *Beaumont* v. *Mountain*, 10 Bing. 404; 4 M. & Scott, 177.

(*b*) Tyrrell, Real Prop. Rep. App. i. 519.

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of the creditors for approving the manner and place of sale fourteen days previous to the meeting; and that the creditors who approved were the major part in value present at the meeting; and the resolution, and also the particulars of sale, must be produced, to shew that the meeting was held thirty days before the sale, and that the sale took place within six months after the execution of the conveyance to the assignee; or if six weeks had elapsed, that an order of the Insolvent Court to extend the time for sale had been obtained (*a*).

Evidence of title where the land was part of the glebe, and has been exchanged under the 55 Geo. 3, c. 147.

Again, says Mr. Tyrrell, when a title is to be shewn to land, which was part of the glebe of a living, and has been exchanged under the 55 Geo. 3, c. 147, three newspapers must be produced to prove that notice of the intended exchange was given by advertisements in certain papers for three successive weeks, six months before the exchange; and plans and valuations both of the estate given, and the estate taken, in exchange; the affidavit of the surveyor to verify them; the commission of inquiry directed by the bishop; the return of it properly signed; and a certificate that the deeds, plans, valuations, commissions, and returns are deposited in the office of the registrar of the diocese, must be produced; and it must be proved that notice of the intended exchange was fixed, for three successive Sundays, on a conspicuous part of the church door, previous to the commencement of service, six months before the exchange; that the surveyor who made the plans and valuations was

(*a*) Real Prop. Rep. App. i. 519.

approved by the incumbent, patron, and ordinary; that three of the persons to whom the commission of inquiry was directed were beneficed clergymen, resident in the neighbourhood; that one was a barrister of three years' standing; that he was named by a judge, and that such judge was the senior one in the last commission of Nisi Prius for the county (*a*).

Fines.

XXIV. The proper evidence of a fine is the indentures, commonly called the chirograph (*b*), or if these are not produced there should be either an exemplification of the fine under the seal of the court, or an examined copy of the roll. And here it may be useful to remark, that by the stat. 3 & 4 Will. 4, c. 74, s. 7, which abolished fines and recoveries, it is enacted, that if it shall be apparent, from the deed declaring the uses of any fine already levied or thereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then, and in every such case, the fine, without any amendment of the

Fines made valid without amendment, by 3 & 4 Will. 4, c. 74, s. 7.

(*a*) Real Prop. Rep. App. i. 519. It being very desirable, in all such cases as these, that the preliminary requisites should not be a necessary part of the title, Mr. Tyrrell suggests that a heavy penalty should be imposed on the persons authorized to make the conveyances if they execute them without having ascertained the correctness of the previous proceedings; and that the *execution* of the conveyance should be evidence that all other forms had been duly complied with.

(*b*) Phill. Evid. i. 387.

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indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission. Notwithstanding this enactment, an application was soon afterwards made to the court of Common Pleas to amend a fine in a case of misdescription, where the parish in which, according to the deed to lead the uses, the premises were situated was erroneously described in the fine; on the ground that this clause did not exclude the jurisdiction of the Court in matters of amendment (*a*), and that a purchaser had refused to accept the title unless the amendment were sanctioned by the Court. This misdescription, however, being apparent on the face of the instrument, was held to be within the meaning of the Act; the Court observing, that if the application were acceded to, they would be in the same situation as before, called upon to amend upon every conveyancer's doubt, and all the expense would be incurred which the Act was passed to prevent (*b*).

Recoveries.

XXV. With regard to recoveries, the proper evidence is an exemplification, or else an examined copy of the roll. Formerly titles were often rendered de-

(*a*) By s. 9 it is provided, that nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, *in cases not provided for by this act.*

(*b*) *Lockington & Shipley*, 1 Bing. N. C. 355.

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Mr. Pigott's Act, 14 Geo. 2, c. 20, s. 4. When record is lost, the deed making a tenant to the writ of entry, and declaring the uses of the recovery, is, under certain circumstances, conclusive evidence that such recovery was duly suffered.

fective in consequence of the recoveries not having been entered on record; and to meet this case it was enacted by the stat. 14 Geo. 2, c. 20, s. 4, (commonly called Mr. Pigott's Act), that where any person or persons hath or have purchased, or shall purchase for a valuable consideration, any estate or estates, in lands, tenements, or hereditaments, whereof a recovery or recoveries is, are, or were necessary to be suffered, in order to complete the title, such person and persons, and all claiming under him, her, or them having been in possession of the purchased estate or estates from the time of such purchase, shall and may, after the end of twenty years from the time of such purchase, produce in evidence the deed or deeds making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or recoveries, and declaring the uses of a recovery or recoveries; and the deed or deeds so produced (the execution thereof being duly proved) shall, in all courts of law and equity, be deemed aud taken as a good and sufficient evidence for such purchaser and purchasers, and those claiming under him, her, or them, that such recovery or recoveries was or were duly suffered and perfected, according to the purport of such deed or deeds, in case no record can be found of such recovery or recoveries, or the same shall appear not to be regularly entered on record; provided always, that the person or persons making such deed or deeds as aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or re-

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coveries. This enactment is of course still applicable to existing titles; but its further operation is determined by the 3 & 4 Will. 4, c. 74.

Stat. 2 & 3 Will. 4, c. 74. Recoveries made valid without amendment.

XXVI. And here it is important to remark, that by this statute (s. 8) it is enacted, that if it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or thereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission.

Recoveries made valid in certain cases where bargain and sale is not duly enrolled.

And by s. 10, it is further enacted, that no common recovery already suffered or thereafter to be suffered shall be invalid in consequence of the neglect to inrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly enrolled.

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Recoveries invalid in consequence of there not being proper tenants to the writs of entry made valid in certain cases.

It is then further enacted, by s. 11, that no common recovery already suffered or thereafter to be suffered shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for a life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; and an estate shall be deemed to be an estate in possession, notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved (*a*).

Certain cases in which fines and recoveries shall not be made valid.

It is, however, provided by s. 12, that where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the

(*a*) See *In re Debary*, 5 Sim. 283; Prest. Conv. i. 90.

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lands therein comprised, such fine or recovery shall not be rendered valid by this act so far as the same shall have been reversed; and where any person who would have been barred by any fine or common recovery if valid shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act; and this act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common recovery, if valid, would have barred, nor any fine or common recovery which, before the passing of this act, any Court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings at law or in equity, pending at the time of the passing of this act, in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery shall retain such right, so that he commence proceedings within six calendar months after the death of such party.

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As to the records of fines and recoveries in the courts of Common Pleas at Westminster and Lancaster, and the court of Pleas at Durham, after the 31st of Dec. 1833.

XXVII. With regard to the records of fines and recoveries, it is by s. 13 enacted, that after the thirty-first day of December one thousand eight hundred and thirty-three the records of all fines and common recoveries levied and suffered in his Majesty's court of Common Pleas at Westminster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said court of Common Pleas shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in his Majesty's court of Common Pleas at Lancaster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as his Majesty's justices of assize for the county palatine of Lancaster for the time being shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in the court of Pleas of the county palatine of Durham, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said court of Pleas shall from time to time order or direct; and in the meantime the said records and proceedings shall remain in the same places respectively where they are now deposited, and be kept by the respective persons who would have continued entitled to the custody thereof if this act had not been passed; and while the said records and proceedings respectively shall be kept by such persons respectively, searches may be made and extracts and copies obtained as heretofore, and on paying the accustomed fees; and when any of

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the records and proceedings shall, by the order of the court or justices having the control over the same, be kept by any other person, then, so far as relates to the records and proceedings in the custody of such other person, searches may be made and extracts or copies obtained at such times and on paying such fees as shall from time to time be ordered by the Court or justices having the control over the same; and the extracts or copies so obtained shall be as available in evidence as they would have been if obtained from the person whose duty it would have been to have made and delivered out the same if this act had not been passed.

Instruments on record.

XXVIII. It often happens that deeds are enrolled either in conformity to some statutory requisition, or for the purpose of safe custody; such instruments, however, (with one exception) though said to be *on record*, are not, properly speaking, assurances by matter of record. The exception alluded to is the case of a bargain and sale of lands indented and enrolled in pursuance of the stat. 27 Hen. 8, c. 16 (*a*).

Copies of enrolments, when evidence.

With regard to copies of enrolments, "the rule is," says Mr. Phillips (*b*), "that an examined copy of the enrolment of a bargain and sale of freehold in lands, pursuant to the statute of Henry 8, is as good evidence as an examined copy of the original itself; and where the original is wanting (as where it has been lost or destroyed, or where different parcels of land are comprised in the same indenture, and after-

(*a*) *Rex* v. *Hopper*, 3 Pri. 495. (*b*) Phill. Evid. i. 463.

wards derived to different persons) (*a*), a copy of the enrolment, signed by the proper officer, who has the custody of the enrolment, and proved by oath to be a true copy, will have the same force and effect as the original itself would have, if produced (*b*). But a copy of the enrolment of a bargain and sale of a chattel interest, or of any other deed enrolled for safe custody, is not admissible in evidence, except as against the party acknowledging the deed, or persons claiming under him; and against such party, and against all claiming under him, an examined copy of the enrolment of any deed is admissible, and equivalent to an examined copy of the original deed" (*c*).

Of the right to attested copies of instruments on record.

XXIX. It was remarked in a former part of this section (Art. XXI.), that whenever the original title deeds cannot be delivered into the custody of the purchaser, he is entitled, at the expense of the vendor, to attested copies of them. This, however, must be understood of instruments *not on record*. "In some cases, however," says Sir E. Sugden, "a purchaser can obtain attested copies even of instruments on record: for a purchaser is entitled to examine the abstract with the original title deeds, or with attested copies of them; and, therefore, if a vendor has not the instrument itself, and cannot obtain it, he is bound to procure an attested copy of it, to enable the purchaser to ascertain that the

(*a*) See preamble of sect. 3, 10 & 11 Anne, c. 18.

(*b*) St. 10 Anne, c. 18, s. 3.

See 14 East, 231; 1 Schoal. & Lef. 207.

(*c*) Phill. Evid. i. 464.

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3. Assurances by special custom.

XXX. 3. Assurances by special custom are usually by surrender and admittance, and principally relate to property of copyhold tenure. The proper evidence of title to such property, consists of the several stamped copies of court rolls originally made out by the steward of the manor, and delivered by him to the parties concerned; for these are the ordinary *indicia* of property, and, as it were, the title deeds of a copyhold estate. If the original copies are not produced, their absence must be satisfactorily accounted for; and until it is shewn beyond all doubt that they are either lost or destroyed, a purchaser or mortgagee cannot be advised to rely altogether on a reference to the manor rolls; for these inform him only as to any *legal* incumbrances on the estate, and not as to any *equitable* mortgage created by a deposit of the copies of court rolls (*b*).

Stamped copies of court rolls.

If the original copies are not produced, their absence must be satisfactorily accounted for.

(*a*) Sugd. Vend. & Pur. i. 529.

(*b*) *Whitbread* v. *Jordan*, 1 You. & Coll. 303. In this case, evidence was produced on both sides relative to the practice of solicitors upon the sale or mortgage of copyholds, in requiring or not requiring stamped copies of the admissions of the vendors or mortgagors. On the part of the plaintiff, it was stated by several solicitors to be their practice,—and, as they believed, the general practice of the profession, —to require from the vendors or mortgagors of copyhold premises the production of such copies; and that it was the duty of the solicitor, if such copies could not be produced, to inquire and satisfy himself of the reason of their non-production, and to explain the circumstances to his client. On the other side, an equal num-

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Manor rolls admissible in evidence.

The manor rolls, however, are admissible in evidence (*a*).

Right to certified copies of the rolls when the original ones are lost or destroyed.

XXXI. When the original copies of court rolls are either lost or destroyed, the purchaser is entitled, at the expense of the vendor (in the absence of any express stipulation to the contrary), to certified copies of all such surrenders, admissions, and other acts entered on the court rolls as are necessary to substantiate the title set forth in the abstract: for the vendor cannot insist on the purchaser's tracing the title on the rolls of the manor, or any public records; and, indeed, the steward cannot be compelled to produce the court rolls to a purchaser, who, until admittance, is a mere stranger (*b*). "It is usual, however," says Mr. Serjeant Scriven, "for the steward to permit the purchaser's solicitor to compare the abstract of title with the court rolls, which affords him the opportunity of ascertaining that no recorded acts of the vendor, or of those

ber of solicitors were examined, who stated that they had always considered the court rolls to be the sole evidence of the title to copyhold estates; that the loss of the copies of court rolls did not, in their opinion, affect the title; and that they would accept, on the behalf of a purchaser or mortgagee, a title to copyhold property, where the mortgagor or vendor had lost or mislaid his copies of court roll, and had not in his possession any document of title whatever, if in the court rolls the title of such mortgagor or vendor appeared to be clear and unincumbered. 1 You. & Coll. 317. This latter practice, however, cannot be safely adopted so long as the law allows an equitable mortgage to be created by depositing with a creditor the copies of court rolls.

(*a*) Phill. Evid. ii. 290; Scriv. Copyh. i. 590.

(*b*) Scriv. Copyh. i. 586, 3rd edit.

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under whom he claims, are omitted. But in some manors, the practice is for the steward to certify the abstract to be a full and faithful statement of the title, as it appears upon the rolls of the manor" (*a*).

Who entitled to original copies of the court rolls when they concern various estates held under the same title.

XXXII. If the property purchased be held under the same title with other estates of greater value belonging to the vendor, the purchaser is not, in practice, considered to be entitled to the *custody* of the original copies of court rolls, though he has a right to insist on their being produced for the purpose of enabling him to verify the abstract, and to ascertain that the estate is not subject to any equitable lien. Nor can the purchaser, it is conceived, call for attested copies of any authenticated copies of entries on the court rolls, of which the vendor is entitled to the custody; for though the court rolls are not, strictly speaking, records (*b*), yet they are considered to fall within the rule that a purchaser has no right, at the expense of the vendor, to attested copies of instruments *on record*, (Vide Art. XXIX.) In connection with this subject it is important to remark, that in one case (*c*) it was held that a purchaser is affected with notice of the contents of the court rolls, as far back as a search is necessary for the security of the title, whether he inspects them or not. This decision, however, has been objected to on the ground that it does not accord with the general rule as to judgments, registered deeds, and the like, and would lead to great inconvenience in practice (*d*).

Court rolls, whether inspected or not affect a purchaser or mortgagee with notice of their contents.

(*a*) Scriv. Copyh. i. 586, 587. 186.
(*b*) Ib. i. 587.
(*c*) *Pearce* v. *Newlyn*, 3 Madd.
(*d*) Sugd. Vend. & Pur. ii. 296; and see 18 Ves. 462.

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4. Assurances by will.

Proof of seisin, devise, and death, when the title relates to freehold property.

XXXIII. 4. To establish a title to freehold property derived under a devise it must be proved, first, that the testator was at the time of making his will seised of the estate devised; secondly, that the will was duly executed and attested; and thirdly, that the testator is dead (*a*). If the will has not been proved, and solely relates to real property, the purchaser is entitled to the custody of it, or at least to an attested copy; but when proved, the probate, or an official copy, is alone produced. Such copies are often made in so very careless a manner, that in all cases of importance it is advisable for the purchaser's solicitor to examine the original will; which, however, he will not be allowed to do, unless an office copy is first paid for or produced (*b*). In a court of law, the probate or official copy, or an exemplification under the great seal, affords no proof of a devise of real property, at least while the original will is in existence (*c*). When the original will has been lost or destroyed, the register or ledger book in which the will is set out at length will be good evidence of its contents (*c*). If the title relate to an estate for term of years, which is only a species of *personal* property, the proper evidence of a bequest by will is either the probate or act book of the Ecclesiastical Court (*d*). In a modern instance, proof also should be given of the assent of the executor; for as all the personal property of

In cases of importance the probate should be examined with the original will.

When the original will is lost, the register book is evidence of its contents.

Evidence of the bequest of personal property.

(*a*) Stark. Evid. ii. 296. See Ch. i. sect. 2. art. xii., ante.

(*b*) Tyrrell, Real Prop. Rep., 514. App. i. 517.

(*c*) Phill. Evid. i. 496.

(*d*) *Cox* v. *Allingham*, 1 Jac.

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Of the relative interests of the executor and legatee.

a testator devolves on his executor, the bequest of a term of years passes only an *inchoate* interest to the legatee, and his title is not complete until he has obtained the executor's assent (*a*). An *implied* assent, however, is sufficient (*b*).

Proof of the identity of parcels.

XXXIV. Having thus briefly treated of the evidences of title by alienation, I shall conclude this section and the present book with a few remarks relative to the proof of the identity of the parcels, or subject-matter of alienation. It was remarked in a former chapter (*c*) that, owing to the imposition of new names, the division of estates, and the consequent confusion of boundaries, and to various other circumstances growing out of the frequent alienation of property in modern times, it is often impossible to identify the estate which is the subject of contract with that described in the earlier instruments. "It may be safely asserted," says a learned and experienced writer (*d*), "that there is no defect which more frequently renders it impossible for a person who has a good title to prove it, or enables a person who has a bad title fraudulently to exhibit a colourable ownership, than the want of evidence of the identity of the parcels." In order to identify the estate contracted for with the estate conveyed by the

(*a*) *Court* v. *Jeffery*, 1 Sim. & Stu. 106; *Abney* v. *Miller*, 2 Atk. 598; *Farrington* v. *Knightley*, 1 P. Wms. 554; *Bennet* v. *Whitehead*, 2 P. Wms. 646; Shepp. Touch. 455.

(*b*) *Doe* d. *Sturges* v. *Tatchell* 8 Barn. & Ad. 675; Bac. Abr. tit. Legacies (L).

(*c*) Chap. 1, s. 2, art. xix. p. 78.

(*d*) Mr. Tyrrell, Real Prop. Rep., App. i. 546.

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abstracted assurances, recourse is usually had to ancient plans, leases, extracts from the land-tax and parish books, and the affidavits of old persons. In many instances, however, the identity cannot be thus made out, and the title is accordingly unmarketable. It must be observed, however, that the generality and vagueness of descriptions of copyhold property on the court rolls are so well known, that a vendor is not bound to shew how the description on the court rolls is to be applied to the present state of the property, if he proves that the property has actually been enjoyed and passed under that description for at least sixty years (*a*).

Stat. 2 & 3 Will. 4, c. 80, authorizing the identifying of lands and other possessions of certain ecclesiastical and collegiate corporations.

XXXV. In consequence of the great difficulty of ascertaining the boundaries or quantities and the identity of lands and other possessions belonging to ecclesiastical and collegiate corporations, these bodies are enabled by the stat. 2 & 3 Will. 4, c. 80 (*b*), to

(*a*) *Long* v. *Collier*, 4 Russ. 267.

(*b*) After reciting, that the archbishops and bishops of the several dioceses, and the deans, and deans and chapters, archdeacons, prebendaries, and canons, and other dignitaries and officers of the several cathedral and collegiate churches and chapels, and the masters or other heads, and fellows and scholars or other societies of the several colleges and halls in the universities of Oxford and Cambridge, and of the colleges of Winchester and Eton, are proprietors of divers manors, messuages, lands, tenements, tithes, and hereditaments, and in many cases the boundaries or quantities and the identity of lands within such manors, and of such messuages, lands, tenements, and hereditaments, and of lands subject to any such tithes, or some part or parts thereof, are unknown or disputed, and it would be a great benefit, as well to such proprietors respectively, as to their lessees, copyhold or customary tenants, sub-lessees, or under-

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enter into an agreement of reference or deed of submission with the others interested; so that such questenants, their, his, or her heirs, executors, administrators, or assigns, if the said manors, messuages, lands, tenements, tithes, and hereditaments were identified, and the boundaries and quantities thereof ascertained and finally settled: it is enacted, that from and after the passing of this act it shall and may be lawful to and for any archbishop, bishop, dean, dean and chapter, or other corporation aggregate or sole hereinbefore mentioned, to enter into an agreement of reference or deed of submission with his or their lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, his, her, or their heirs, executors, administrators, or assigns, or with the owner or owners of any other hereditaments adjoining to or intermixed with the said manors, messuages, lands, tenements, tithes, or hereditaments, whereby it shall be agreed that any unknown or disputed boundaries or quantities of such manors, messuages, lands, tenements, tithes, or hereditaments, or any part thereof, shall be referred to the adjudication of such person or persons as may be agreed upon and named by the said archbishop, bishop, dean, dean and chapter, or other corporation aggregate or sole, and by his or their lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, his, her, or their heirs, executors, administrators, or assigns, or by such owner or owners of any other hereditaments situate as aforesaid; and that such referee or referees shall be fully authorized to make or cause to be made surveys, maps, and admeasurements of the said manors, messuages, lands, tenements, tithes, and hereditaments, or any part thereof, and to summon any persons as witnesses, and examine them on oath (which oath he or they are hereby authorized to administer) touching or concerning any of the matters or things so referred as aforesaid, or in any way relating thereto; and also to call for the production of all surveys, maps, deeds, books, papers, and writings in the custody or power of any of the parties to the said reference, or of any other person or persons, of or concerning the matters in question; and the said referee or referees, having well and sufficiently investigated and considered the same, and all matters to him or them referred, shall and may make his or their award or awards in writing, un-

Archbishops, bishops, deans and chapters, &c., may enter into agreements or deeds of reference with their lessees, to ascertain and settle unknown or disputed boundaries or quantities of manors, &c. leased.

Referees to make surveys, maps, and admeasurements; to summon and examine witnesses on oath; to call for all deeds, &c.

to make awards, with maps thereto, on parchment or vellum.

tions may be determined by the adjudication of some person or persons agreed upon by the parties con-

der his or their hand and seal or hands and seals, with a map or maps drawn thereupon or thereunto annexed, and which said award or awards and map or maps shall be upon parchment or vellum, and shall award and determine, identify, delineate, and describe the boundaries, quantities, particulars, and situations of the said manors, messuages, lands, tenements, tithes, and hereditaments so referred to him or them as aforesaid; and the said award or awards and map or maps shall be laid before all the parties to any such agreement of reference or deed of submission, including the party or parties whose consent is required by this act, whose approbation thereof shall be written upon the said award or awards, and shall be signed and sealed by them, and thereupon the said award or awards and map or maps shall be for ever afterwards binding upon all parties, and final and conclusive as to all matters therein contained or thereby referred to.

It is, however, by s. 2, provided that in every case in which any of the powers hereinbefore contained shall be exercised by any bishop, dean, archdeacon, prebendary, or other ecclesiastical corporation sole, the deed of submission or agreement of reference, and also the approbation of the award shall, in the case of a bishop, be executed by the archbishop of the province testifying his consent thereto; or in case of a dean, the same shall be executed by the dean and chapter testifying their consent thereto; or in the case of an archdeacon, prebendary, or other ecclesiastical corporation sole, the same shall be executed by the archbishop or bishop of the diocese testifying his consent thereto.

Certain consents required to render valid proceedings under this act.

And by s. 3, it is further enacted, that from and after the passing of this act, it shall and may be lawful to and for the said lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners as hereinbefore named, his, her, or their heirs, executors, administrators, or assigns, who at the time of making any reference authorized by this act shall be tenant or tenants in fee tail, general or special, or for life or lives, and for the guardians, husbands, committees, or attornies of or acting for any such lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners as hereinbefore named, his, her, or their heirs,

Power to infants, married women, lunatics, &c. to enter into reference.

Awards and maps to be laid before parties, and their approbation to be written.

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cerned; and it is declared that if the award be made in conformity to the provisions of the Act, it shall be for ever afterwards binding upon all parties, and final and conclusive as to all matters therein contained or thereby referred to. By s. 4 it is enacted, that immediately after the execution by the parties of the instrument shewing their approbation of any award to be made by virtue of this act, the agreement of reference or deed of submission, and also the award or awards and map or maps, authorized to be made by this act, and a copy of the minutes of evidence whereupon the same is made, shall be deposited, in the case of any reference by any archbishop or bishop, in the office of their own registrar; and in case of any reference by any dean, dean and chapter, archdeacon, prebendary, canon, and other dignitary and officer of a cathedral or collegiate church or chapel, in the office of the registrar of the dean and chapter thereof; and in case of any reference by any masters or other heads, or by any fellows and scholars, or

Agreements or deeds of reference, awards and maps, to be deposited in registry of archbishop, bishop, &c.

executors, administrators, or assigns, who at the time of making any such reference shall be respectively an infant orinfants, feme covert or femes covert, or of unsound mind, or beyond the seas, or under any other legal disability, or otherwise disabled to act for themselves, himself, or herself, to sign, seal, and deliver any agreement of reference or deed of submission or approbation of any award or awards and map or maps authorized by this act to be made, as fully and effectually to all intents and purposes as if such lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners as hereinbefore named, his, her, or their heirs, executors, administrators, or assigns, had been tenant or tenants in fee simple, and of full age, sole, of sound mind, or within the realm of England, and not under any other legal disability.

other societies hereinbefore named, in the office of the steward or other proper officer of their said colleges and halls; and every such registrar, steward, or other officer, or some person or persons on his behalf, shall produce the documents and papers so deposited with him, or any of them, at all proper and usual hours of business, to every person interested in the subject matter of such award, or to his or her agent duly authorized, who shall make application to inspect the same or any of them, and shall furnish a copy or copies of the same or any of them to every such person or agent who shall make application for such copy or copies (*a*).

Documents to be produced for inspection.

(*a*) By the same section it is enacted, that every such registrar, steward, or other officer shall in every case be entitled to the sum of five shillings and no more for receiving and preserving the agreement of reference or deed of submission, award or awards, map or maps, and copy of the minutes of evidence as aforesaid; and the sum of one shilling and no more for every production of the same or any of them to be inspected; and the sum of sixpence and no more for every folio containing seventy-two words of every copy; and the sum of ten shillings and no more for every copy of a map so made as aforesaid.

Registrar's fees.

APPENDIX.

THE following Statutes are so closely connected with the subject of the foregoing Book, that it has been thought advisable to insert them in this place rather than at the end of the Essay. Such adjudged cases as have occurred upon any of the enactments are collected in the Annotations subjoined.

1 WILL. IV. c. 47.

ASSETS.
St. 1 W. 4, c. 47.

An Act for consolidating and amending the Laws for facilitating the Payment of Debts out of Real Estate. [16*th July*, 1830.]

WHEREAS an act was passed in the third and fourth years of King William and Queen Mary, intituled "An Act for the relief of creditors against fraudulent devises," which was made perpetual by an act passed in the sixth and seventh years of King William the Third, intituled "An Act for continuing several laws therein mentioned:" And whereas an act was passed by the Parliament of Ireland, in the fourth year of Queen Anne, intituled "An Act for relief of creditors against fraudulent devises:" And whereas an act was passed in the forty-seventh year of his late Majesty King George the Third, intituled "An Act for more effectually securing the payment of debts of traders: And whereas it is expedient that the provisions of the said recited acts should be enlarged, and that the said recited acts should be repealed, in order that all the provisions relating to this matter should be consolidated in one act; be it therefore enacted by the King's most excellent Majesty, by and

3 & 4 W. & M. c. 14.

6 & 7 W. 3, c. 14.

4 Ann. c. 5, (I.)

47 G. 3, c. 74.

ASSETS. St. 1 W. 4, c. 47.

with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that the said several recited acts shall be and the same are hereby repealed, but so as not to affect any of the provisions and remedies of the said acts, or any of them, to the benefit of which any persons are entitled, as against any estate or interest in any lands, tenements, hereditaments, or other real estate, of any person or persons who died before the passing of this act.

Recited acts repealed.

For remedying frauds committed on creditors by wills.

II. And whereas it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having by bonds, covenants, or other specialties bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted, that all wills and testamentary limitations, dispositions, or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them, with whom the person or persons making any such wills or testaments, limitations, dispositions, or appointments shall have entered into any bond, covenant, or other specialty binding his, her, or their heirs), to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding.

Enabling creditors to recover upon bonds, &c.

III. And, for the means that such creditors may be enabled to recover upon such bonds, covenants, and other specialties, be it further enacted, that in the cases before mentioned every such cre-

ASSETS. St. 1 W. 4, c. 47.

ditor shall and may have and maintain his, her, and their action and actions of debt or covenant upon the said bonds, covenants, and specialties against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first-mentioned devisee or devisees jointly, by virtue of this act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended.

If there is no heir at law actions may be maintained against the devisee.

IV. And be it further enacted, that if in any case there shall not be any heir at law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor to whom by this act relief is so given shall and may have and maintain his, her, and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid.

Not to affect limitations for just debts, or portions for children.

V. Provided always, and be it further enacted, that where there hath been or shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, according to or in pursuance of any marriage contract or agreement in writing, *bona fide* made before such marriage, the same and every of them shall be in full force, and the same manors, messuages, lands, tenements, and hereditaments shall and may be holden and enjoyed by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators, and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid, and satisfied, any thing in this act contained to the contrary notwithstanding.

Heir at law to be answerable for debts, although he may sell estate before action brought.

VI. And be it further enacted, that in all cases where any heir at law shall be liable to pay the debts or perform the covenants of his ancestors, in regard of any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir at law shall be answerable for such debt or debts, or covenants, in

Assets. St. 1 W. 4, c. 47.

an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments, *bona fide* aliened before the action brought, shall not be liable to such execution.

Where an action of debt is brought against the heir, he may plead riens per descent.

VII. Provided always, and be it further enacted, that where any action of debt or covenant upon any specialty is brought against the heir, he may plead riens per descent at the time of the original writ brought or the bill filed against him, any thing herein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements, or hereditaments from his ancestor before the original writ brought or bill filed; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or nihil dicit, it shall be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended.

Devisees to be liable the same as heirs at law.

VIII. Provided always, and be it further enacted, that all and every the devisee and devisees made liable by this act, shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought.

Traders estates shall be assets to be administered in Courts of Equity.

IX. And be it further enacted, that from and after the passing of this act, where any person being, at the time of his death, a trader, within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, or other real estate, which he shall not by his last will have charged with or devised subject to or for the payment of his debts, and which would be assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, devisee or devisees of such debtor, and the devisee or devisees of

Assets. St. 1 W. 4, c. 47.

such first-mentioned devisee or devisees, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by specialty in which the heirs were bound: provided always, that in the administration of assets by courts of equity, under and by virtue of this provision, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands.

Creditors by specialty to be paid first.

X. And be it further enacted, that from and after the passing of this act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur, but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of this act be carried on or prosecuted by or against any infant, where, according to law, the parol did not demur.

Parol shall not demur by or against infants.

XI. And be it further enacted, that where any suit hath been or shall be instituted in any Court of Equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such Court of Equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such Court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said Court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years.

Infants to make conveyances under order of the Court.

XII. And be it further enacted, that where any lands, tenements, or hereditaments hath been or shall be devised in settlement by any person or persons whose estate under this act, or by law, or by his or their will or wills, shall be liable to the payment of any of his or

Persons having a life interest may convey the fee, if the estate is ordered to be sold.

ASSETS. St. 1 W. 4, c. 47.

their debts, and by such devise shall be vested in any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person or persons from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof for the payment of such debts or any of them, it shall be lawful for the Court by whom such decree shall be made to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple or other the whole interest or interests so to be sold to the purchaser or purchasers, or in such manner as the said Court shall think proper; and every such conveyance, release, surrender, assignment, or other assurance shall be as effectual as if the person who shall make and execute the same were seised or possessed of the fee simple or other whole estate so to be sold.

Not to repeal Act 33 G. 1. (I). relating to debts due to bankers.

XIII. And be it further enacted, that nothing in this act shall extend or be deemed or construed to extend to repeal or alter an Act made by the Parliament of Ireland, in the thirty-third year of the reign of King Georgethe Second, intituled "An Act for repealing an Act passed in this kingdom in the eighth year of the reign of King George the First, intituled *An Act for the better securing the payment of bankers notes, and for providing a more effectual remedy for the security and payment of the debts due by bankers.*"

ANNOTATIONS.

I. It will be observed, that although the words at the beginning of section 11—"where any suit hath been or shall be instituted"—clearly include suits previously instituted, as well as suits which should be instituted afterwards; yet, in the next member of the sentence, terms of narrower import are used; and the case to which the clause is to apply is stated to be where—"such Court of Equity *shall* decree"—not—"shall have decreed or shall decree"—the estates to be sold. On this ground a doubt was suggested in *Chapman* v. *Tennant*, 2 Russ. & Myl. 74, whether the Act applied where the decree was pronounced prior to the passing of the Act. The Master of the Rolls observed, that, although the authority was plainly given in suits which had been commenced prior to the Act, yet the subsequent language seemed to point to sales under decrees made subsequent to this Act. Considering, however, the case to be within the spirit and intention of the Act, he ordered the infant heir and devisee to convey.

II. In *Brook* v. *Smith*, 2 Russ. & Myl. 73, a question arose whether sect. 11 applied to an infant who was neither the heir nor the devisee of the debtor, but the *heir of the devisee*. But the Court held the case to be within the Act.

2 & 3 WILL. IV. c. 71.

TIME OF PRESCRIPTION. 2 & 3 W.4,c.71.

An Act for shortening the time of prescription in certain cases.

[1st August, 1832].

WHEREAS the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by shewing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted, by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Claims to right of common and other profits à prendre, not to be defeated after thirty years enjoyment by shewing the commencement;

after sixty years enjoyment, the right to be absolute, unless had by consent or agreement.

II. And be it further enacted, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body cor-

In claims of right of way or other easement, the periods to be twenty years and forty years.

TIME OF PRESCRIPTION. 2 & 3 W. 4, c. 71.

porate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Claim to the use of light enjoyed for twenty years indefeasible, unless shewn to have been by consent.

III. And be it further enacted, that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Before-mentioned periods to be deemed those next before suits for claims to which such periods relate.

IV. And be it further enacted, that each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

In actions on the case, the claimant may allege his right generally, as at present.

V. And be it further enacted, that in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of

In pleas to trespass and other pleadings, where party used to allege his claim from

right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied specially.

VI. And be it further enacted, that in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

Restricting the presumption to be allowed in support of claims herein provided for.

VII. Provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

Proviso for infants, &c.

VIII. Provided always, and be it further enacted, that when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

What time to be excluded in computing the term of forty years appointed by this act.

IX. And be it further enacted, that this act shall not extend to Scotland or Ireland.

Not to extend to Scotland or Ireland.

TIME OF PRESCRIPTION. 2 & 3 W.4, c.71.

X. And be it further enacted, that this act shall commence and take effect on the first day of Michaelmas Term now next ensuing.

Commencement of act.

XI. And be it further enacted, that this act may be amended, altered, or repealed during this present session of Parliament.

Act may be amended.

ANNOTATIONS.

I. The general design and operation of this statute are fully explained in the following judgment delivered by Mr. Baron Parke, in *Bright* v. *Walker*, 1 Cr. Mees. & Rosc. 211; 4 Tyrw. 508:—

"This was an action on the case for obstructing a way to the plaintiff's wharf, which was tried before my brother Gurney at the last summer assizes at Worcester, when a verdict passed for the plaintiff, with liberty to move to enter a nonsuit on two grounds—first, that the plaintiff's title to the right of way was not made out by the evidence; and, secondly, that it was not properly described in the declaration. On shewing cause, the second objection was disposed of by the Court; and the only point now to be considered is, whether the right of way was established.

"The way claimed was from a wharf in a close called Cliff Meadow, through Eacham Meadow, over the locus in quo called the Acre, where the obstruction took place, into a public highway. Cliff and Eacham Meadows were held under the Bishop of Worcester, by a lease for three lives, granted in 1805 to Alderman Davis. In 1809, Roberts purchased the leasehold interest from Davis, and began to make bricks in Cliff Meadow, and carried them through Eacham Meadow and the Acre into the highway. In 1811, Dallow, the then occupier of the Acre, and the assignee of a lease for four lives under the bishop of the close called the Acre, put up a gate to obstruct Roberts in carrying bricks. Roberts broke it down; and he and the plaintiff, who claimed under him, continued to carry bricks over the Acre without interruption for more than twenty years, when the defendant claiming as assignee of the bishop's lease under Dallow obstructed the way, and for that obstruction the action was brought. No proof was given on either side that either of the original leases had been surrendered; and, therefore, the case must be considered as if both had continued to the time of the obstruction. The jury found —first, that they would not presume any grant of right of way by the bishop; and, secondly, that the plaintiff and Roberts had actually enjoyed the way without interruption for more than twenty years; and the only question is, whether such an enjoyment gives to the plaintiff a right of way over the defendant's close, so as to enable him to maintain this action. And this depends upon the construction of the act of the 2 & 3 Will. IV. c. 71, and particularly section 2.

"For a series of years prior to the passing of this act, judges had been in the habit, for the furtherance of justice and the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years by analogy to the Statute of Limitations. Such presumptions did not always proceed on a belief that the thing presumed had actually taken place; but, as is properly said by Mr. Starkie, in his excellent

"Treatise on Evidence," Vol. ii., p. 669, 'a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation;' and though in theory it was presumptive evidence, in practice and effect it was a bar. And that learned author observes, that so heavy a tax on the consciences and good sense of juries, which they were called on to incur for the sake of administering substantial justice, ought to be removed by the legislature. The act in question is intended to accomplish this object, by shortening in effect the period of prescription, and making that possession a *bar* or title of itself, which was so before only by the intervention of a jury.

TIME OF PRESCRIPTION. 2 & 3 W. 4, c. 71.

"The title of the act is, 'For shortening the time of prescription in certain cases.' And it recites, that the expression, 'time immemorial,' or 'time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters which have been long enjoyed is sometimes defeated, by shewing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice. It then proceeds to enact in the second section, that 'no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived, upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way, by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.'

"In order to establish a right of way, and to bring the case within this section, it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which, by section 5, such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant; therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed 'as of right' the easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and,

TIME OF PRESCRIPTION.
2 & 3 W. 4, c. 71.

therefore, it may be answered by proof of a grant, or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. So far the construction of the act is clear; and this enjoyment of twenty years having been uninterrupted, and not defeated on any ground above mentioned, would give a good title. But if the enjoyment take place with the acquiescence or by the laches of one who is tenant for life only, the question is, what is its effect according to the true meaning of the statute? Will it be good to give a right against the see, and those claiming under it by a new lease; or only as against the termor and his assigns during the continuance of the term; or will it be altogether invalid?

"In the first place, it is quite clear that no right is gained against the bishop; whatever construction is put on the 7th section, it admits of no doubt under the 8th. This section provides, 'That when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.' It is quite certain, that an enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period, as against the bishop, it certainly must from the shorter. Therefore, there is no doubt but that this possession of twenty years gives no title as against the bishop, and cannot affect the right of the see.

"The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the locus in quo, gives a title as against the lessee and the defendants claiming under him or not at all? We have had considerable difficulty in coming to a conclusion on this point; but, upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title against all, and permanently affect the see. Before the statute, this possession would indeed have been evidence to support a plea or claim by a non-existing grant from the termor, in the locus in quo, to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. But since the statute, such a qualified right, we think, is not given by an enjoyment for twenty years. For, in the first place, the statute is 'for the shortening the time of prescription;' and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. And, in the next place, the statute nowhere contains any in-

TIME OF PRESCRIPTION. 2 & 3 W. 4, c. 71.

timation that there may be different classes of rights, qualified and absolute—valid as to some persons, and invalid as to others. From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good as against any one, and, therefore, not against the defendant. This view of the case derives confirmation from the 7th section, which provides as follows:—'That the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.' This section, it is to be observed, in express terms, excludes the time that the person (who is capable of resisting the claim to the way) is *tenant for life;* and unless the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. That construction does not appear to us to be at variance with any other part of the act, nor to lead to any absurdity. During the period of a tenancy for life, the exercise of an easement will not affect the fee; in order to do that, there must be that period of enjoyment against an owner of the fee. The conclusion, therefore, to which we have arrived is, that the statute in this case gives no right from the enjoyment that has taken place; and as section 6 forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other by the proof of possession alone. Of course, nothing that has been said by the Court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or upon proof of its loss by secondary evidence; nor prevent the jury from taking the possession into consideration, with other circumstances, as evidence of a grant, which they may still find to have been made, if they are satisfied that it was made in point of fact. We are therefore of opinion, that, in the present case, the plaintiff is not entitled to recover, but that a nonsuit must be entered.

II. In the *Monmouth Canal Company* v. *Harford*, 1 Cr. Mees. & Rosc. 614, 631, upon an issue, in an action of trespass, whether a way had been used and enjoyed as of right and without interruption for twenty years, the following remarks were made:—

Parke, B.—"The issue is, whether the occupiers of the closes, *of right* and *without interruption*, have had the use and enjoyment for twenty years, as they insist, under this issue; therefore they must shew an uninterrupted rightful enjoyment for twenty years. If they had enjoyed it for one week and not for the next, and so on alternately, their plea would not have been proved. In the case of *Bright* v. *Walker*, (1 Cr. Mees. & Rosc. 211), lately decided in this Court, it was held that the claimant must shew that he has enjoyed the way

TIME OF PRESCRIPTION. 2 & 3 W.4, c. 71.

for the full period of twenty years, and that he has done so *as of right* and *without interruption*, and that such claim might be answered by proof of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years. In the present case, the permission asked for and given shews that the occupiers of the closes did not enjoy the way 'as of right,' and also that they did not enjoy it uninterruptedly."

Lyndhurst, C. B.—"The simple issue is, whether there has been a continued enjoyment of the way for twenty years, and any evidence negativing the continuance is admissible. Every time that the occupiers asked for leave, they had admitted that the former licence had expired, and that the continuance of the enjoyment was broken."

The ensuing observations, however, of Patteson, J., in *Payne* v. *Shedden*, 1 Moo. & Rob. 383, seem to be hardly reconcileable with the above judicial *dicta*:—"If there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the old right for twenty years, to make it indefeasible under the statute; for the agreement to suspend the enjoyment of the right does not extinguish, nor is it inconsistent with the right. So, if, instead of the direct path from A. to B., another track over the plaintiff's land from A. to C., and thence to B., had been substituted by a fresh agreement of the parties for an indefinite time, yet the user of this substituted line may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it."

III. In *Wright* v. *Williams*, 1 Mees. & Wels. 77, it was decided that a right of pouring dirty water into the watercourse over another's land, is a watercourse over the land of another within the second section of this act. As the judgment delivered in this case is illustrative of the operation of the act in several particulars, it has been thought proper to give it at length:—

Lord Abinger, C. B.—"This is an action on the case for an injury alleged to be done to the interest of the plaintiff's reversion in certain closes of land; the declaration alleges, that the defendants made divers pits and holes upon a close adjacent to those of which the plaintiff is possessed of the reversion, over which last-mentioned closes there is a certain watercourse, in which the water has been accustomed to flow for the use of the tenants and occupiers; that these pits and holes were filled with water impregnated with iron and other metallic substances, which rendered the water impure, in which state the defendant caused it to be turned into the watercourse, and to be mixed with and to adulterate the pure water which would otherwise have flowed over the plaintiff's land. To this the defendant pleads two pleas, which are substantially the same, viz.:—that the Marquis of Anglesea was the occupier of a copper mine, and of the closes upon which the pits and holes were sunk, and that he and all the occupiers of that mine for the space of forty years before the commencement of this suit have been accustomed and were and are entitled as of right to sink the pits and holes in these closes for the purpose of placing therein the water pumped out of the mine, and of precipitating the copper, and had for the same space of time before the commencement of this suit been accustomed of right, and without interruption, to cause the water after it was so used to flow down the watercourse in the declaration mentioned, over the closes therein mentioned; and, in effect, to do that of which the plaintiff complains; and then justifies the acts done by them as the servants of the Marquis of Angle-

sea, under the right so set up and exercised for above forty years before the commencement of this suit.

TIME OF PRESCRIPTION. 2 & 3W.4, c.71.

"The replication sets forth, that Rice Thomas was seised in his demesne as of fee of the several closes over which the watercourse passes, and that by certain indentures of lease and release therein stated, his interest was conveyed to trustees for the uses therein mentioned, and one of which was to the use of Rice Thomas for life, with a power to Rice Thomas whilst so seised of the freehold for his life to grant leases, upon certain conditions therein named, by indenture; that Rice Thomas, by virtue of this settlement, did become seised of the freehold for his life; and that, whilst he was so seised, by virtue of the power therein contained, he did by indenture duly made between himself of the one part, and Edward Hughes and Thomas Williams of the other part, enfeoff the said Hughes and Williams of the said closes for and during the term of the lives of William Lewis Hughes, now Lord Dinorben, Owen Williams, and John Davies, and the longest liver of them; and the replication concludes by stating, that Lord Dinorben, one of the lives, is still in being.

"To this replication there is a demurrer.

"The first point to be considered in this case is, whether the pleas are bad in substance. Two objections were made to them:—first, that the right claimed of pouring dirty water into the watercourse in the plaintiff's land is not within the 2nd section of the statute 2 & 3 Will. IV. c. 71; secondly, that the pleas are bad, because the forty years' enjoyment is not stated to have been before the act complained of in the declaration, and justified by each of the pleas.

"Upon the first of these objections the Court intimated a clear opinion in the course of the argument. We thought that the right in question was within the 2nd section, as being a claim to a *watercourse* over the land of another, and we have seen no reason to change that opinion.

"The other objection requires more consideration.

"It is said for the plaintiff, that, although the act in the 4th section expressly states that the periods of twenty and forty years shall be deemed and taken to be next before the commencement of some suit wherein the claim shall have been brought into question, yet that this enactment must be construed to mean, that the periods shall be those next *before the act complained of*, on account of the absurdities and inconveniences to which a literal construction of this provision would give rise.

"One of these alleged absurdities and inconveniences was, that no good title could arise to any incorporeal hereditament mentioned in the statute by virtue thereof, unless some action should have been brought by or against the party claiming it; to which may be added that *one* action could not perfect the title to the right, as the act requires an enjoyment for the full period immediately before *any* action. Another was, that, if the act be so construed, the plea justifying under such a right must be on the face of it absurd, as each of the pleas in question is suggested to be, for each justifies an act done at a particular time by the defendant as being *then* lawful, and *then* done, *because* the defendant actually enjoyed the right of doing the same thing for a period of time *afterwards;* so that, it is said, the character of the act, whether it be wrongful or rightful, cannot be known at the time by the party doing it, but depends upon a subsequent event.

TIME OF PRESCRIPTION. 2 & 3 W.4, c.71.

"We are of opinion, however, that it is impossible to construe the act of Parliament as intending that the periods of years therein mentioned should terminate at a different time from that fixed in express and positive terms. If the words of the statute were capable of being modified, so as to avoid an inconvenience plainly and manifestly arising from a strict construction of them, we ought to do so; but here the words are precise and unambiguous, and the mischief suggested is perhaps rather apparent than real; and most cases of grants by prescription, before the act passed, were of the same nature, and the validity of rights gained by them depended much upon the mode of enjoyment until that action was brought in which they came in question: and with respect to the form of the plea, which is at first sight somewhat incongruous, it is to be observed that there is something of the same kind of incongruity, though by no means to the same extent, in the usual mode of pleading a prescription, which states that some person seised in fee, from time whereof the memory of man is not to the contrary, until and at the time when &c., and from *thence hitherto*, hath had and enjoyed, and hath been used and accustomed to have and enjoy, and *still* of right ought to have and enjoy, a particular easement; and then justifies the act done by reason of that enjoyment; which enjoyment is both before and after the time of such act. It appears to us that the statute in question intended to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and to legalize every act done in the exercise of the right during their continuance; and we think the pleas are, for these reasons, sufficient in point of law.

"The next question is, whether the replications are good; and we are clearly of opinion that they are not.

"The enjoyment of the right during forty years alleged in the pleas being admitted, the replications, which state only an existing tenancy for life, are no answer; for the time of a tenancy for life in a person who might otherwise be capable of resisting the claim, though excluded by the 7th section from the computation of the shorter period of twenty years *absolutely*, is, by the 8th section, excluded from the computation of the longer period of forty years conditionally only; that is, provided the reversioner expectant on the determination of the term for life shall, within three years (that is, probably, *before* the end of three years) after such determination, resist the right; and it does not appear that the plaintiff is entitled to the reversion *expectant on that lease*, though it is averred that he has a reversion expectant on the determination of the interest of the tenant in possession. The tenancy for the life of Lord Dinorben, the cestui que vie, is therefore not to be excluded, on these pleadings, from the period of forty years; and, such period being complete, the defendant is entitled to an indefeasible right to the easement claimed.

"Another objection was urged to the mode of stating the feoffment in the replication, upon which it is not necessary to enter.

"We therefore think that the defendant is entitled to judgment; but, on account of the difficulty in construing the new act, and the importance of the case, the plaintiff may amend on payment of costs.

"Judgment accordingly."

IV. The periods of enjoyment mentioned in the act are such as are *next* before the commencement of an action. *Jones* v. *Price*, 3 Bing. N. C. 52. And see the judgment in *Wright* v. *Williams*, supra.

V. Under a general traverse of an allegation of a right of way, enjoyed as of right for forty years, evidence is admissible of an agreement within that period to pay a sum of money for permission to use the way. *Tickle* v. *Brown*, 6 Nev. & Man. 280.

TIME OF PRESCRIPTION. 2 & 3W.4, c.71.

Semble, that evidence of an annual payment for such permission, within the forty years, would be admissible in support of an allegation of an interruption for a year, and acquiescence in the interruption; and that a special allegation of a deed or agreement is required, under section 5, in those cases only where the deed or agreement *precedes* the forty or twenty years, and that an agreement, made *within* the particular period of forty or twenty years, may be given in evidence under the general traverse, whether such agreement be in writing or verbal.

"It seems," said the Court, "that the 'enjoyment as of right,' must mean an enjoyment had not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person *claiming* to use it, without danger of being treated as a trespasser, *as a matter of right*, whether strictly legal, by prescription and adverse user, or by deed conferring the right; or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal in case of a plea of enjoyment for 40 years, or by such writing, or by parol consent or agreement, contract, or licence, in case of a plea of enjoyment for 20 years."

And under a replication denying that the defendant had used the way for forty years, as of right and without interruption, the plaintiff is at liberty to shew the character and description of the user and enjoyment of the way during any part of the time; as, that it was used by stealth, or in the absence of the occupier of the close and without his knowledge, or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was an user or enjoyment under a claim of right, the words of the *fifth* section, "not inconsistent with the simple fact of enjoyment," being referable to the fact of enjoyment as before stated in the act, *viz.*, an enjoyment claimed and exercised *as of right*. *Beasley* v. *Clarke*, 3 Scott, 258.

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2 & 3 WILL. IV. c. 100.

An Act for shortening the Time required in Claims of Modus Decimandi, or Exemption from or discharge of Tithes.

[*9th August*, 1832.]

MODUS DECIMANDI AND EXEMPTION FROM TITHES. 2 & 3 Will. 4, c. 100.

WHEREAS the expence and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented, by shortening the time required for the valid establishment of claims of a modus decimandi, or exemption from or discharge of tithes; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all prescriptions and claims of or for any modus decimandi,

What prescriptions and

Modus Decimandi and Exemption from Tithes. 2 & 3 Will. 4, c. 100.

or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our said lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law upon evidence shewing, in cases of claim of a modus decimandi, the payment or render of such modus, and in cases of claim to exemption or discharge shewing the enjoyment of the land, without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a modus decimandi, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity from the modus claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shewn to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible upon evidence shewing such payment or render of modus made or enjoyment had, as is herein-before mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of modus made or enjoyment had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall

claims of modus decimandi to be valid in law.

Proviso.

Modus Decimandi and Exemption from Tithes. 2 & 3 Will. 4, c. 100.

with such time be sufficient to make up the full period of sixty years and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing.

What compositions for tithes shall be considered valid.

II. And be it further enacted, that every composition for tithes which hath been made or confirmed by the decree of any court of equity in England in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law; and that no modus, exemption, or discharge shall be deemed to be within the provisions of this act, unless such modus, exemption, or discharge shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this act.

The act not available in any suit now commenced, &c.

III. Provided always, that this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced, during the present session of parliament, or within one year from the end thereof.

To what cases this act shall not extend.

IV. Provided also, and be it further enacted, that this act shall not extend or be applicable to any case where the tithes of any lands, tenements, or hereditaments shall have been demised by deed for any term of life or number of years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind within three years next after the expiration, surrender, or other determination of such demise or composition.

Time during which lands shall be held by persons entitled to the tithes thereof to be excluded in the computation under this act;

V. Provided also, and be it further enacted, that where any lands or tenements shall have been or shall be held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or by any tenant of any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in

the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time herein-before mentioned.

as also the time during which any person capable of resisting any claim shall be an infant, &c.

VI. Provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods herein-before mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

What it shall be sufficient to allege in actions commenced under this act.

VII. And be it further enacted, that in all actions and suits to be commenced after this act shall take effect it shall be sufficient to allege that the modus or exemption or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed.

No presumption allowed in support of any claim for any less period than mentioned in this act.

VIII. And be it further enacted, that in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

Act to extend to England only.

IX. Provided also, and be it further enacted, that this act shall not extend to Scotland or Ireland.

ANNOTATIONS.

Estates sold tithe free.

I. When an estate is sold *tithe free*, the vendor must either shew a title in himself to the tithes, originating in an appropriation, and a grant from the crown, or establish a clear case of exemption arising from circumstances capable of proof, and which had, or might have had, a legal commencement. The foregoing statute will very much facilitate the latter object. If the vendor fail to prove the estate to be tithe free, this is generally considered to be a

substantial objection; and the court will not compel a purchaser to take the title with a compensation. *Smith* v. *Tolcher*, 4 Russ. 305; *Ker* v. *Clobery*, Sugd. Vend. & Pur. i. 295; and see Book I. ch. ii. sect. 1, art. vi. ante. "The good sense," said Sir John Leach, M. R., "of this general rule is not to be denied. But there may be cases of obvious exception, and such a case occurred in *Binks* v. *Lord Rokeby*, 2 Swan. 222, before Lord Eldon, who is to be regarded as the author of the rule. A considerable landed estate was contracted to be sold tithe free, and a good title was shewn to all the tithe, except as to a very few acres, and Lord Eldon held that the right to the tithe of the few acres could not be considered so material to the enjoyment of the estate, as to have formed the inducement to the purchaser to enter into the contract; and he compelled the purchaser to complete his contract, with a compensation for the value of those tithes as to which the title was defective." 4 Russ. 305.

Modus Decimandi and Exemption from Tithes. 2 & 3 Will. 4, c. 100.

II. See the stat. 6 & 7 Will. 4, c. 71, for the Commutation of Tithes in England and Wales, *post*.

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3 & 4 WILL. IV. c. 27.

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto. [24*th July*, 1833.]

Limitation of Actions and Suits. 3 & 4 W. 4, c. 27.

BE it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in

Meaning of the words in the act.

"Land."

"Rent."

Person through whom another claims.

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dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"Person."

Number and gender.

No land or rent to be recovered but within 20 years after the right of action accrued to the claimant or some person whose estate he claims.

II. And be it further enacted, that after the thirty-first day of December one thousand eight hundred and thirty-three, no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same.

When the right shall be deemed to have accrued;

III. And be it further enacted, that in the construction of this act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such disposition or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or other-

in the case of an estate in possession;

on dispossession;

on abatement or death;

on alienation;

wise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

in case of future estates;

in case of forfeiture or breach of condition.

IV. Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

Where advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.

V. Provided also, that a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

Reversioner to have a new right.

VI. And be it further enacted, that for the purposes of this act

An administrator to claim as

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an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

If he obtained the estate without interval after death of deceased.

In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

VII. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled, subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestuique trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

No person after a tenancy from year to year, to have any right but from the end of the first year or last payment of rent.

VIII. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

Where rent amounting to 20*s.*, reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.

IX. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

X. And be it further enacted, that no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.

A mere entry not to be deemed possession.

XI. And be it further enacted, that no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

No right to be preserved by continual claim.

XII. And be it further enacted, that when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

Possession of one coparcener, &c. not to be the possession of the others.

XIII. And be it further enacted, that when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

Possession of a younger brother not to be the possession of the heir.

XIV. Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.

Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent.

XV. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing

Where possession is not adverse at the time of passing the act, the right shall not be

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of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this act.

barred until the end of five years afterwards.

Persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed ten years from the termination of their disability or death.

XVI. Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid such person shall have been under any of the disabilities hereinafter mentioned, (that is to say), infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).

But no action, &c., shall be brought beyond forty years after the right of action accrued.

XVII. Provided nevertheless, and be it further enacted, that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

No further time to be allowed for a succession of disabilities.

XVIII. Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the

time at which such person shall have died, shall be allowed by reason of any disability of any other person.

XIX. And be it further enacted, that no part of the united kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this act.

Scotland, Ireland, and the adjacent islands, not to be deemed beyond seas.

XX. And be it further enacted, that when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

XXI. And be it further enacted, that when the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

Where tenant in tail is barred, remainder-men, whom he might have barred, shall not recover.

XXII. And be it further enacted, that when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

Possession adverse to a tenant in tail shall run on against the remainder-men whom he might have barred.

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or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole but within two incumbencies and six years, or sixty years.

XXIX. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as herein-after is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years, and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said thirty-first day of December one thousand eight hundred and thirty-three no such entry, distress, action or suit shall be made or brought at any time beyond the determination of such period.

No advowson to be recovered but within three incumbencies or sixty years.

XXX. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as herein-after is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all

of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.

Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishopricks.

XXXI. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop.

When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

XXXII. And be it further enacted, that in the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action, or suit shall be limited accordingly.

No advowson to be recovered after 100 years.

XXXIII. Provided always, and be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he

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or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole but within two incumbencies and six years, or sixty years.

XXIX. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as herein-after is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years, and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said thirty-first day of December one thousand eight hundred and thirty-three no such entry, distress, action or suit shall be made or brought at any time beyond the determination of such period.

No advowson to be recovered but within three incumbencies or sixty years.

XXX. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as herein-after is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all

of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.

Incumbencies after lapse to be reckoned within the period, but not incumbencies after promotions to bishopricks.

XXXI. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop.

When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

XXXII. And be it further enacted, that in the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action, or suit shall be limited accordingly.

No advowson to be recovered after 100 years.

XXXIII. Provided always, and be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three no person shall bring any quare impedit or other action or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he

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claims, or of some other person entitled in respect of an estate, share or right, held or derived under the same title.

At the end of the period of limitation the right of the party out of possession to be extinguished.

XXXIV. And be it further enacted, that at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.

Receipt of rent to be deemed receipt of profits.

XXXV. And be it further enacted, that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act.

Real and mixed actions abolished after the 31st December 1834,

XXXVI. And be it further enacted, that no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisis, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment,) and no plaint in the nature of any such writ or action (except a plaint for freebench or dower), shall be brought after the thirty-first day of December one thousand eight hundred and thirty-four.

except for dower, quare impedit, and ejectment.

LIMITATION OF ACTIONS AND SUITS.
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XXXVII. Provided always, and be it further enacted, that when, on the said thirty-first day of December one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June one thousand eight hundred and thirty-five, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired.

Real actions may be brought until the 1st June, 1835.

XXXVIII. Provided also, and be it further enacted, that when, on the said first day of June one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June one thousand eight hundred and thirty-five, but only within the period during which by virtue of the provisions of this act an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away.

Saving the rights of persons entitled to real actions only at the commencement of the act, &c.

XXXIX. And be it further enacted, that no descent cast, discontinuance, or warranty which may happen or be made after the said thirty-first day of December one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land.

No descent, warranty, &c. to bar a right of entry.

XL. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given.

Money charged upon land and legacies to be deemed satisfied at the end of twenty years if there shall be no interest paid or acknowledgment in writing in the meantime.

LIMITATION OF ACTIONS AND SUITS. 3 & 4 W. 4, c. 27.

XLI. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

No arrears of dower to be recovered for more than six years.

No arrears of rent or interest to be recovered for more than six years.

XLII. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent; provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

Act to extend to the spiritual courts.

XLIII. And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three, no person claiming any tithes, legacy, or other property for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity.

Act not to extend to Scotland, nor to advowsons in Ireland.

XLIV. Provided always, and be it further enacted, that this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland.

Act may be amended.

XLV. And be it further enacted, that this act may be amended, altered, or repealed during this present session of parliament.

ANNOTATIONS.

I. A feme sole, being seised of an estate in fee, married; and she and her husband, after continuing in possession for some time, removed to a distant place of residence, and never returned; ceasing altogether to exercise any further act of ownership or occupation. Both died, at times which were not proved to be within forty years from the period when they ceased to occupy. The wife's heir at law brought an ejectment; but it being clear that within the terms of the third section of this act, the plaintiff's mother was dispossessed or discontinued the possession or receipt of the rents above forty years before the commencement of the action, the claim of the heir was held to be barred by section 17. *Doe* d. *Corbyn* v. *Bramston*, 3 Ad. & Ell. 63. "Some argument," said the Court, "was raised on the question whether the possession was adverse or not; but the terms of that clause are unequivocal, and one of its objects was to avoid the necessity of inquiring into facts of so ancient a date. If the persons actually in possession," continued the Court, "could be shown to have held under him through whom the plaintiff claims, the possession of the former might be regarded as the possession of the latter; but in this case there was not a single fact from which such inference could be drawn. On the contrary, the departure of the former possessors to a distance, without appearing to have received any rent or made any demand, is the strongest evidence of their intending to abandon at once all occupation and all claims of ownership. And as the title of the plaintiff's ancestor rested on no documents, but was merely evidenced by possession at an early period, that ancestor's entire desertion of the premises for so long a time goes far to shew a consciousness that the anterior occupation was without title. It is true that if Mrs. Corbyn was the owner, her husband [having survived her] was tenant by the courtesy, and their son's right of possession did not accrue till after his father's death; but this furnishes no answer to the positive enactment of limitation in the seventeenth section. It is true also, that, in the cases cited at the bar, this court shewed a strong indisposition to presume a possession adverse, which might be lawful, consistently with the facts found: of these cases no more need be said on the present occasion than that they were not brought within the late statute." 3 Ad. & Ell. 66.

II. In *James* v. *Salter*, 2 Bing. N. C. 505, 4 Scott, 750, & 1 Hodges, 405, it was held that the devisee of an annuity, who had never received any payment in respect of it, was not barred, under this act, by the lapse of more than twenty years from the time of the first payment becoming due.

III. In *Paddon* v. *Bartlett*, 5 Nev. & M. 383, it was decided that the period for recovering the arrears of rent, limited by section 42 of this act, does not apply to actions commenced before 24th July, 1833, the time when it passed.

IV. In *Paget* v. *Foley*, 2 Bing. N. C. 679, & 4 Scott, 120, it was held that, notwithstanding the limitation of six years by sect. 42 of this act, an action of covenant for arrears of rent was maintainable within the period limited by the stat. 3 & 4 W. 4, c. 42, s. 3, the latter operating as a *pro tanto* repeal of the former.

V. The enactment in section 40 puts an end altogether to the discretion of courts of equity, in those cases where they had before acted by analogy to

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the time limited at law. That was an analogy founded both in law and good sense, but it no longer remains in the discretion of the Court, but is incorporated in the statute.—Per Lord Chief Baron in *Berrington* v. *Evans*, 1 You. & Coll. 439. In that case it was contended, on the authority of *Sterndale* v. *Hankinson*, 1 Sim. 393, that a bill filed by one creditor on behalf of himself and all others is a bill filed by all; and consequently that if such a bill was filed before the statute of limitations has attached to the debt of any creditor, it is sufficient to keep alive the claims of all the creditors; and consequently that one who has never heard of the suit, and notwithstanding he has suffered twenty years to elapse without taking any steps to recover his debt, may, where there is an available fund in court, insist on receiving payment rateably with the other creditors. The Court, however, held the claim to be clearly barred. "The statute says that such a claim shall not be made after twenty years, unless in the meantime some part of the money, either principal or interest thereon, shall have been paid, or some acknowledgment shall have been given in writing. These are the only exceptions mentioned in the act. Nothing is said of the case of a bill being filed by one creditor for the benefit of the rest; and I cannot engraft another exception on the act of parliament."—Per Lord Chief Baron, 1 You. & Coll. 440.

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3 & 4 WILL. IV. c. 104.

ASSETS.
3 & 4 Will. 4, c. 104.

An Act to render freehold and copyhold Estates Assets for the Payment of simple and contract Debts. [29*th August*, 1833.]

WHEREAS it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at laws, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same

Freehold and copyhold estates in all cases to be assets for the payment of simple contract or specialty debts.

suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound: provided always, that in the administration of assets by courts of equity under and by virtue of this act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands.

ASSETS. 3 & 4 Will. 4, c. 104.

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3 & 4 WILL. IV. c. 105.

An Act for the Amendment of the Law relating to Dower.

[29*th August*, 1833.]

DOWER. 3 & 4 Will. 4, c. 105.

BE it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing.

Meaning of the words in the act:

"Land."

Number.

II. And be it further enacted, that when a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in jointenancy), then his widow shall be entitled in equity to dower out of the same land.

Widows to be entitled to dower out of equitable estates.

III. And be it further enacted, that when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered

Seisin shall not be necessary to give title to dower.

DOWER. 3 & 4 Will. 4, c. 105.

possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

No dower out of estates disposed of.

IV. And be it further enacted, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

Priority to partial estates, charges, and specialty debts.

V. And be it further enacted, that all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

Dower may be barred by a declaration in a deed;

VI. And be it further enacted, that a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

or by a declaration in the husband's will.

VII. And be it further enacted, that a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when, by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Dower shall be subject to restrictions.

VIII. And be it further enacted, that the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid.

Devise of real estate to the widow shall bar her dower.

IX. And be it further enacted, that where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

Bequest of personal estate to the widow shall not bar her dower.

X. And be it further enacted, that no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

Agreement not to bar dower may be enforced.

XI. Provided always, and be it further enacted, that nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any

husband not to bar the right of his widow to dower out of his lands, or any of them.

DOWER. 3 & 4 Will. 4, c. 105.

XII. And be it further enacted, that nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

Legacies in bar of dower still entitled to preference.

XIII. And be it further enacted, that no widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris.

Certain dowers abolished.

XIV. And be it further enacted, that this act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower.

Act not to take effect before the 1st January, 1834.

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3 & 4 WILL. IV. c. 106.

An Act for the Amendment of the Law of Inheritance.

[29*th August*, 1833].

INHERITANCE. 3 & 4 Will. 4, c. 106.

BE it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act should exclude such construction, be interpreted as follows; (that is to say), the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same

Meaning of words in the act:

"Land."

DOWER. 3 & 4 Will. 4, c. 105.

possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

No dower out of estates disposed of.

IV. And be it further enacted, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

Priority to partial estates, charges, and specialty debts.

V. And be it further enacted, that all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

Dower may be barred by a declaration in a deed;

VI. And be it further enacted, that a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

or by a declaration in the husband's will.

VII. And be it further enacted, that a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when, by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Dower shall be subject to restrictions.

VIII. And be it further enacted, that the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid.

Devise of real estate to the widow shall bar her dower.

IX. And be it further enacted, that where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

Bequest of personal estate to the widow shall not bar her dower.

X. And be it further enacted, that no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

Agreement not to bar dower may be enforced.

XI. Provided always, and be it further enacted, that nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any

husband not to bar the right of his widow to dower out of his lands, or any of them.

DOWER. 3 & 4 Will. 4, c. 105.

XII. And be it further enacted, that nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

Legacies in bar of dower still entitled to preference.

XIII. And be it further enacted, that no widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris.

Certain dowers abolished.

XIV. And be it further enacted, that this act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower.

Act not to take effect before the 1st January, 1834.

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An Act for the Amendment of the Law of Inheritance.

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INHERITANCE. 3 & 4 Will. 4, c. 106.

BE it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act should exclude such construction, be interpreted as follows; (that is to say), the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same

Meaning of words in the act:

"Land."

INHERITANCE. 3 & 4 Will. 4, c. 106.

estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"The purchaser."

"Descent."

"Descendants."

"Person last entitled."

"Assurance."

Number and gender.

Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary be proved.

II. And be it further enacted, that in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

III. And be it further enacted, that when any land shall have been devised, by any testator who shall die after the thirty-first day of December one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said thirty-first day of December one thousand eight hundred and thirty-three, to the person or to the

heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

INHERITANCE. 3 & 4 Will. 4, c. 106.

IV. And be it further enacted, that when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land.

Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

V. And be it further enacted, that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

Brothers, &c., shall trace descent through their parent.

VI. And be it further enacted, that every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

Lineal ancestor may be heir in preference to collateral persons claiming through him.

VII. And be it further enacted and declared, that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

The male line to be preferred.

VIII. And be it further enacted and declared, that where there shall be a failure of male paternal ancestors of the person from

The mother of more remote male ancestor

INHERITANCE. 3 & 4 Will. 4, c. 106.

whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor and her descendants.

to be preferred to the mother of the less remote male ancestor.

Half blood, if on the part of a male ancestor, to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.

IX. And be it further enacted, that any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

After the death of a person attainted, his descendants may inherit.

X. And be it further enacted, that when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January one thousand eight hundred and thirty-four.

Act not to extend to any descent before Jan. 1834.

XI. And be it further enacted, that this act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of January one thousand eight hundred and thirty-four.

Limitations made before the 1st Jan. 1834, to the heirs of a person then living, shall take effect as if the act had not been made.

XII. And be it further enacted, that where any assurance executed before the said first day of January one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the

person or persons who would have answered such description of heir if this act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January one thousand eight hundred and thirty-four.

INHERITANCE. 3 & 4 Will. 4, c. 106.

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4 WILL. IV. c. 22.

An Act to amend an Act of the Eleventh Year of King George the Second, respecting the Apportionment of Rents, Annuities, and other periodical Payments. [16*th June*, 1834].

APPORTIONMENT OF PERIODICAL PAYMENTS. 4 Will. 4, c. 22. 11 Geo. 2, c. 19.

WHEREAS by an act passed in the eleventh year of the reign of his Majesty King George the Second, intituled "An Act for the more effectual securing the payment of rents, and preventing frauds by tenants," it was enacted, that where any tenant for life should happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant for life should and might, in an action on the case, recover of and from such undertenant or undertenants of such lands, tenements, or hereditaments, if such tenant for life die on the day on which the same was made payable the whole, or if before such day then a proportion of such rent according to the time such tenant for life lived of the last year or quarter of a year or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively: And whereas doubts have been entertained whether the provisions of the said act apply to every case in which the interests of tenants determine on the death of the person by whom such interests have been created, and on the death of any life or lives for which such person was entitled to the lands demised, although every such case is within the mischief intended to have been remedied and prevented by the said act; and it is therefore desirable that such doubts should be removed by a declaratory law: And whereas, by law, rents, annuities, and other payments due at fixed or stated periods are not apportionable (unless express provision be made for the purpose), from which it often happens that persons (and their representatives) whose income is wholly or principally derived from these sources by the determina-

APPORTIONMENT OF PERIODICAL PAYMENTS.
4 Will. 4, c. 22.

tion thereof before the period of payment arrives are deprived of means to satisfy just demands, and other evils arise from such rents, annuities, and other payments not being apportionable, which evils require remedy: Be it therefore enacted and declared by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered as within the provisions of the said recited act.

Rents reserved on leases determining on the death of the person making them (though not strictly tenant for life), or on the death of the tenant pur autre vie, to be considered as within the provisions of recited act.

II. And be it further enacted, that from and after the passing of this act all rents service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the united kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act, or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions,

All rents, annuities, and other payments coming due at fixed periods to be apportioned;

subject to all just deductions.

and other payments being made; and that every such person, his or her executors, administrators, and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions, and other payments if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who if this act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act in any action or suit at law or in equity.

APPORTIONMENT OF PERIODICAL PAYMENTS.
4 Will. 4, c. 22.

Remedies for obtaining the apportioned parts.

III. Provided always, and be it enacted, that the provisions herein contained shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description.

Act not to apply to certain cases.

ANNOTATION.

By the stat. for the Commutation of Tithes, 6 & 7 Will. 4, c. 71, s. 86, it is enacted, that all rent charges payable under that act shall be subject to all the several provisions of the 4 Will. 4, c. 22.

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4 & 5 WILL. IV. c. 23.

An Act for the Amendment of the Law relative to the Escheat and Forfeiture of real and personal Property holden in Trust.
[27*th June*, 1834.]

ESCHEAT AND FORFEITURE.
4&5 W. 4, c. 32.

WHEREAS great inconvenience has been found to result to persons beneficially entitled to real or personal property by the escheating or forfeiture thereof to his Majesty, to corporations, to lords of manors, and others, in consequence of the death without heirs, or

ESCHEAT AND FORFEITURE. 4 & 5 W. 4, c. 23.

the conviction for treason or felony, of a trustee in whom or in whose name the same is vested: And whereas it is expedient that the same should be remedied: And inasmuch as, in order to avoid repetition, certain words are used in this act as describing subjects some of which, according to their usual sense, such words would not embrace; for the understanding of the sense attached to them in this act, be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that the provisions of this act shall extend to and include the several estates and persons, matters and things hereinafter mentioned; (that is to say,) those relating to land, to any manor, messuage, tenement, hereditament, or real property, whether freehold, customaryhold, copyhold, or of any tenure whatever; those relating to chattels, to personal property of every description capable of being transferred or disposed of otherwise than in books kept by any company or society, or to any share thereof or interest therein; those relating to stock, to any fund, annuity, or security transferable in books kept by any company or society established or to be established, or to any money payable for the discharge and redemption thereof, or to any share or interest therein; those relating to dividends, to interest, or other annual produce; those relating to a conveyance, to any lease and release, surrender, or other assurance of real property, including all acts and deeds necessary for making and perfecting the same; those relating to an assignment, to any surrender, delivery, or other disposition of the personal property, and to all acts, deeds, and things necessary for making and perfecting the same; those relating to a transfer, to any payment or other disposition of stock; those relating to an heir, to any devisee or other real representative, by the common law, or by custom, or otherwise; and those relating to an executor, to any administrator or other personal representative; unless there be something in the subject or context repugnant to such construction; and whenever this act, in describing or referring to any trustee or other person, or any trust, land, stock, conveyance, assignment, transfer, grant, matter, or thing, uses the word importing the singular number or the masculine gender only, the same shall be understood to include and shall be applied to several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, and several trusts, lands, stocks, conveyances, assignments, transfers, grants, matters, or things respectively as well as

Description of estates and matters included in the provisions of this act, and construction of terms used.

one trust, land, stock, conveyance, assignment, transfer, grant, matter, or thing respectively, unless there be something in the subject or context repugnant to such construction.

If trustee or mortgagee of any land die without an heir, the Court of Chancery may appoint a person to convey.

II. And be it enacted, that where any person seised of any land upon any trust or by way of mortgage dies without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land in like manner as is provided by the act of the eleventh year of King George the Fourth and the first year of his present Majesty, intituled "An Act for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees, and for enabling courts of equity to give effect to their decrees and orders in certain cases," in case such trustee or mortgagee had left an heir, and it was not known who was such heir; and such conveyance shall be as effectual as if there was such heir.

Lands, &c., vested in any trustee shall not be escheated by reason of the attainder or conviction of such trustee.

III. And be it further enacted, that no land, chattels, or stock vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to his Majesty, his heirs or successors, or to any corporation, lord of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his co-trustee, or descend or vest in his representative, as if no such attainder or conviction had taken place.

To whom and to what cases the provisions of this act shall extend.

IV. And be it enacted, that the several provisions of this act shall extend to every case of a trustee having some beneficial estate or interest in the same subject, or some duty as trustee to perform, and also to every case of a trust arising or resulting by implication of law or by construction of equity.

This act not to prevent the escheat of any beneficial interest.

V. Provided always, and be it hereby enacted, that nothing contained in this act shall prevent the escheat or forfeiture of any land, chattels, or stock vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such land, chattels, or stock, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed.

Where any person possessing lands, &c., as a trustee shall have died without heirs, or have been convicted, before the passing of this act, the

VI. And whereas it is expedient to relieve persons beneficially entitled to real or personal property which has already escheated or become forfeited to his Majesty, to corporations, to lords of manors, or others, by any of the means aforesaid; be it therefore enacted, that in all cases where before the passing of this act any person possessed of or entitled to any land, chattels, or stock, or any right to or interest in any land, chattels, or stock, as a trustee thereof,

ESCHEAT AND FORFEITURE. 4 & 5 W.4, c.23.

either in whole or in part, or jointly with some other trustee or trustees, shall have died without an heir, or shall have been convicted of any offence whereby the said land, chattels, or stock, or any of them, have escheated or been forfeited, or have become subject to any escheat or forfeiture, then and in every or any such case the said land, chattels, or stock, or the right thereto or interest therein which hath escheated or been forfeited, or become subject to escheat or forfeiture by reason thereof, shall be subject to the order, control, and disposition of the Court of Chancery, for the use of the party beneficially interested therein, in such manner, and subject in all respects to such rights and incidents, and to such orders and regulations of the said Court, under the provisions of the said act of the eleventh year of King George the Fourth and of the first year of his present Majesty, as if such person so dead without an heir, or so convicted as aforesaid, were out of the jurisdiction of or not amenable to the process of the said Court, without having been so convicted: Provided always, that nothing in this clause contained shall extend to any land, chattels, or stock now vested in any person by virtue of any grant thereof made subsequently to the time when such escheat or forfeiture first occurred, or to any land, chattels, or stock which more than twenty years prior to the passing of this act shall have been actually vested in possession or reduced into possession by the party entitled thereto by virtue of any such escheat or forfeiture.

lands, &c., shall become subject to the control of the Court of Chancery.

Proviso.

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6 & 7 WILL. IV. c. 71.

COMMUTATION OF TITHES. 6 & 7 W.4, c.71.

An Act for the Commutation of Tithes in England and Wales. [13*th August*, 1836].

WHEREAS it is expedient to amend the laws relating to tithes in England and Wales, and to provide the means for an adequate compensation for tithes, and for the commutation thereof: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that it shall be lawful for one of his Majesty's principal secretaries of state to appoint two fit persons to be commissioners to carry this act into execution, and for the Archbishop of Canterbury, under his hand and archiepiscopal seal, to appoint one fit person to be a commissioner to carry this act into execution,

Appointment of commissioners.

and for the said archbishop and secretary of state, at their joint pleasure, to remove any one or more of the commissioners so appointed; and upon every vacancy in the office of commissioner some other fit person shall be appointed to the said office in the same manner and by the same authority as the commissioner whose vacancy is thereby supplied; and until such appointment it shall be lawful for the continuing commissioners or commissioner to act as if no such vacancy had occurred.

Style of commissioners.

II. And be it enacted, that the said commissioners shall be styled "The Tithe Commissioners for England and Wales," and shall have their office in London or Westminster, and they, or any two of them, may sit from time to time, as they deem expedient, as a board of commissioners for carrying this act into execution; and the said commissioners shall cause to be made a seal of the said board, and shall cause to be sealed or stamped therewith all agreements and awards confirmed by the said commissioners in pursuance of this act; and all such agreements and awards and other instruments proceeding from the said board, or copies thereof, purporting to be sealed or stamped with the seal of the said board, shall be received in evidence without any further proof thereof; and no agreement or award shall be of any force unless the same shall be sealed or stamped as aforesaid.

To have a common seal.

Awards, &c., purporting to be sealed with such seal, to be received as evidence.

Commissioners to report to secretary of state.

III. And be it enacted, that the said commissioners shall from time to time give to any one of his Majesty's principal secretaries of state such information respecting their proceedings or any part thereof as the said principal secretary of state shall require, and shall once in every year send to one of the principal secretaries of state a general report of their proceedings; and every year such general report shall be laid before both houses of Parliament within six weeks after the receipt of the same by such principal secretary of state, if Parliament be sitting, or if Parliament be not sitting, then within six weeks after the next meeting thereof.

Annual report to be laid before parliament.

Power to appoint assistant commissioners, secretary, assistant secretary, &c.

IV. And be it enacted, that it shall be lawful for the commissioners from time to time to appoint a sufficient number of persons to be assistant commissioners, and also a secretary and assistant secretary, and all such clerks, messengers, and officers as they shall deem necessary, and to remove such assistant commissioners, secretary or assistant secretary, clerks, messengers, or officers, or any of them, and on any vacancy in any of the said offices to appoint some other person to the vacant office; and the persons so appointed shall assist in carrying this act into execution at such places and

COMMUTATION OF TITHES. 6 & 7 W.4, c. 71.

in such manner as the said commissioners may direct: Provided always, that the said commissioners shall not appoint more than twelve such assistant commissioners to act at any one time, unless the lord high treasurer, or any three or more of the commissioners of his Majesty's treasury, shall, in the case of each such appointment, consent thereto; provided further, that the number of such clerks, messengers, and officers shall be subject to the like consent.

Limiting the number of appointments.

V. And be it enacted, that no commissioner or assistant commissioner appointed as aforesaid shall, during his continuance in such office, be capable of being elected or of sitting as a member of the house of commons.

Commissioners not to sit in the House of Commons.

VI. And be it enacted, that no commissioner or assistant commissioner, secretary, assistant secretary, or other officer or person so to be appointed, shall hold his office for a longer period than five years next after the day of the passing of this act, and thenceforth until the end of the then next session of parliament; and after the expiration of the said period of five years, and of the then next session of parliament, so much of this act as authorizes any such appointment shall cease.

Operation of act as to appointment of commissioners, &c. limited to five years.

VII. And be it enacted, that the salaries of the commissioners, the allowance to the assistant commissioners, and the salaries of the secretary, assistant secretary, clerks, messengers, and other officers to be appointed under this act, shall be from time to time regulated by the lord treasurer or the lords commissioners of his Majesty's treasury, or any three of them: Provided always, that the salary of a commissioner shall not exceed the sum of 1500*l.* a year, nor the allowance to an assistant commissioner the sum of 3*l.* for every day that he shall be actually employed or travelling in the performance of the duties of his office, nor the salaries of the secretary or assistant secretary the sum of 800*l.* a year; and that the salaries of the clerks, messengers, and other officers shall be in fit proportion: Provided also, that the said lord treasurer or lords commissioners may allow to any commissioner, assistant commissioner, secretary, assistant secretary, clerk, messenger, or other officer, any such reasonable travelling and other expences as may have been incurred by him in the performance of his duties under this act, in addition to his salary or allowance respectively.

Salaries of and allowances to commissioners and assistant commissioners, secretary, and other officers.

VIII. And be it enacted, that the salaries, allowances, and travelling and other expences of the commissioners, assistant commissioners, secretary, assistant secretary, clerks, messengers, and officers as aforesaid, and all other incidental expences of carrying

Such salaries, allowances, and other expences, how to be paid.

this act into execution, not herein otherwise provided for, shall be paid by the lord treasurer or the lords commissioners of his Majesty's treasury out of the consolidated fund.

Commissioners and assistant commissioners to take an oath.

IX. And be it enacted, that every such commissioner and assistant commissioner shall, before he shall enter upon the execution of his office, take the following oath before one of the judges of his Majesty's Court of King's Bench or Common Pleas, or one of the Barons of the Court of Exchequer; (that is to say),

Form of oath.

'I A. B. do swear, that I will faithfully, impartially, and honestly, 'according to the best of my skill and judgment, fulfil all the powers 'and duties of a commissioner [*or* assistant commissioner, *as the* '*case may be*,] under an act passed in the year of the 'reign of King William the Fourth, intituled [*here set forth the* '*title of this act*].'

Notification of appointment to be published in the Gazette.

And the appointment of every such commissioner and assistant commissioner, with the time when and the name of the judge or baron before whom he shall have taken the oath aforesaid, shall be forthwith published in the London Gazette.

Commissioners or assistant commissioner may summon and examine witnesses.

X. And be it enacted, that the said commissioners, or any assistant commissioner, may, by summons under their or his hand, require the attendance of all such persons as they or he may think fit, to examine upon any matter brought before them or him as hereinafter mentioned relating to the commutation of tithes, and also make any inquiries and call for any answer or return as to any such matter, and also administer oaths, and examine all such persons upon oath, and cause to be produced before them or him upon oath all books, deeds, contracts, agreements, accounts, and writings, terriers, maps, plans, and surveys, or copies thereof respectively, in anywise relating to any such matter: Provided always, that no such person shall be required, in obedience to any such summons, to travel more than ten miles from the place of his abode, or to produce any deeds, papers, or writings relating to the title of any lands or tithes.

Commissioners may delegate powers to assistant commissioners, except the powers to be exercised under their seal.

XI. And be it enacted, that the said commissioners may delegate to their assistant commissioners, or to any one or more of them, such of the powers hereby given to the said commissioners as the said commissioners shall think fit, (except the power to confirm agreements and awards, or to frame forms of agreements and other instruments, as hereinafter provided, or to do any act herein required to be done under the seal of the said commissioners,) and the powers so delegated shall be exercised under such regulations as the said

COMMUTATION OF TITHES. 6 & 7 W.4, c.71.

commissioners shall direct; and the said commissioners may at any time recall or alter all or any of the powers delegated as aforesaid, and, notwithstanding the delegation thereof, may act as if no such delegation had been made; and all acts done by any such assistant commissioner in pursuance of such delegated powers shall be obeyed by all persons as if they had proceeded from the said commissioners, and the non-observance thereof shall be punishable in like manner.

Meaning of the words "person," "lands," "tithes," "parish," "parochial," "landowner," "tithe-owner," as used in this act.

XII. And be it enacted, that in the construction and for the purposes of this act, unless there be something in the subject or context repugnant to such construction, the word "person" shall mean and include the King's Majesty, and any body corporate, aggregate, or sole, as well as an individual; and any word importing the singular number only shall mean and include several persons or parties as well as one person or party, and several things as well as one thing respectively, and the converse; and any word importing the masculine gender only shall mean and include a female as well as a male; and the word "lands" shall mean and include all messuages, lands, tenements, and hereditaments; and the word "tithes" shall mean and include all uncommuted tithes, portions and parcels of tithes, and all moduses, compositions real, and prescriptive and customary payments; and the word "parish" and "parochial" shall mean and include and extend to every parish and every extra-parochial place, and every township or village, within which overseers of the poor are separately appointed under the provisions of an act passed in the thirteenth and fourteenth years of the reign of his late Majesty King Charles the Second, intituled "An Act for the better relief of the poor of this kingdom," and every district of which the tithes are payable under a separate impropriation or appropriation, or in a separate portion or parcel, or which the commissioners shall by any order direct to be considered as a separate district for the commutation of tithes; and the words "landowner" or "tithe-owner," or "owner of lands" or "owner of tithes," shall mean and include every person who shall be in the actual possession or receipt of the rents or profits of any lands or tithes, (except any tenant for life or lives, or for years, holding under a lease or agreement for a lease on which a rent of not less than two thirds of the clear yearly value of the premises comprised therein shall have been reserved, and except any tenant for years whatsoever holding under a lease or agreement for a lease for a term which shall not have exceeded fourteen years from the commencement thereof,) and that without regard to the real amount of interest of such person: and in every

13 & 14 Car. 2, c. 12.

case in which any tithes or lands shall have been leased or agreed to be leased to any person for life or lives, or for years, by any lease or agreement for a lease on which a rent less than two thirds of the clear yearly value of the premises comprised therein shall have been reserved, and of which the term shall have exceeded fourteen years from the commencement thereof, the person who shall for the time being be in the actual receipt of the rent reserved upon such lease or agreement for a lease shall, jointly with the person who shall be liable to the payment of such rent of such tithes or lands, be deemed for the purposes of this act to be the owner of such tithes or lands; and in every case in which any person shall be in possession or receipt of the rents or profits of any tithes or lands under any sequestration, extent, elegit, or other writ of execution, or as a receiver under any order of a court of equity, the person against whom such writ shall have issued, or who but for such order would have been in possession, shall, jointly with the person in possession by virtue of such writ or order, be deemed for the purposes of this act to be the owner of such tithes or lands.

Where parties to be deemed joint owners.

When the ownership of lands or tithes, or patronage, is vested in the crown, who shall be deemed the owner or patron.

XIII. And be it enacted, that whenever the ownership of any lands or tithes to which the provisions of this act are intended to apply shall be vested in his Majesty, the first commissioner of his Majesty's woods, forests, and land revenues for the time being, or in case such lands or tithes shall be vested in his Majesty in right of the Duchy of Lancaster or of the Duchy of Cornwall, the Chancellor of the Duchy of Lancaster, or the officers of the Duchy of Cornwall entitled to grant leases of lands parcel of the Duchy of Cornwall, shall for the purposes of this act be substituted instead of the owner of such lands or tithes respectively; and whenever the patronage of any benefice to which the provisions of this act are intended to apply shall be vested in his Majesty, the lord high treasurer or first lord commissioner of the treasury for the time being, where the value of such benefice is above the yearly value of 20*l.* in the King's books, and where such value is of or below the yearly value of 20*l.* in the King's books, the Lord Chancellor or lord keeper, or first lord commissioner of the great seal for the time being, shall for the purposes of this act be substituted instead of the patron: Provided nevertheless, that if such patronage is vested in his Majesty in right of the Duchy of Lancaster, the Chancellor for the time being of such duchy shall, for the purposes of this act, be substituted instead of the patron.

When the same person is owner

XIV. And be it enacted, that whenever any person shall be at

the same time owner of any lands and owner of any tithes comprised within any agreement to be executed pursuant to the provisions of this act, or besides being owner of any lands or of any tithes, shall also be patron of the benefice to which the tithes in question may belong, such person, in relation to such agreement, may act and be dealt with in each of the several characters so borne by him as aforesaid.

of lands, and owner of tithes, he may be dealt with in both characters.

In case the patron or owner is under legal disability, who to act.

XV. And be it enacted, that whenever the patron of any benefice or the owner of any lands or tithes to which the provisions of this act are intended to apply, or any person interested in any question as to any tithes, shall be a minor, idiot, lunatic, feme covert, beyond the seas, or under any other legal disability, the guardian, trustee, committee of the estate, husband, or attorney respectively, or in default thereof such person as may be nominated for that purpose by the commissioners after due inquiry shall have been made by them as to the fitness of such person, and whom they are hereby empowered to nominate under their hands and seal, shall for the purposes of this act be substituted in the place of such patron, owner, or person so interested.

Acts may be done by agents duly authorized.

XVI. And be it enacted, that it shall be lawful for any landowner or titheowner, by a power of attorney given in writing under his hand, to appoint an agent to act for him in carrying into execution the provisions of this act; and all things which by this act are directed to be done by or with relation to any person, may be lawfully done by or with relation to the agent so duly authorized of such person; and every such agent shall have full power, in the name and on behalf of his principal, to concur in and execute any agreement, and to vote on any question arising out of the execution of this act; and every person shall be bound by the acts of any such agent, according to the authority committed to him, as fully as if the principal of such agent had so acted; and the power of attorney under which the agent shall have acted, or a copy thereof authenticated by the signature of two credible witnesses, shall be appended to every agreement executed by any such agent, and shall be sent with it to the office of the commissioners as hereinafter provided; and any such power of attorney may be in the form following:

Power of attorney.

'I A. B. of [*&c.*], do hereby appoint C. D. of [*&c.*], to be my 'lawful attorney, to act for me in all respects as if I myself were 'present and acting in the execution of an act passed in the sixth 'and seventh years of his present Majesty, intituled [*here insert the 'title of this act.*]'

(Signed) 'A. B.'

COMMUTATION OF TITHES. 6 &7W.4. c. 71.

XVII. And be it enacted, that any one or more of the land owners or tithe owners, whose interest respectively shall not be less than one-fourth part of the whole value of the lands subject to tithes, or one-fourth part of the whole value of the tithes of any parish in England or Wales, may call a parochial meeting of land owners and tithe owners within the limits of the parish, by notice thereof in writing under his or their hand, to be affixed at least twenty-one days before such meeting on the principal outer door of the church, or in some public and conspicuous place within the limits of the parish, and to be twice at least during such twenty-one days inserted in some newspaper generally circulated within the county in which such parish is situated, for the purpose of making an agreement for the general commutation of tithes within the limits of such parish; and every land owner and tithe owner attending such meeting shall bear his own expences of attendance; and the land owners and tithe owners who shall be present at any such meeting called as aforesaid, and whose interest in the lands and tithes of the parish respectively shall not be less than two thirds of the lands subject to tithes, two-thirds of the great tithes, and two-thirds of the small tithes of the parish, may proceed to make and execute a parochial agreement for the payment of an annual sum by way of rent-charge, variable as hereinafter provided, instead of the great and small tithes of the parish collectively, or instead of the great tithes and small tithes severally, to the respective owners thereof in the said parish; and every agreement so made and executed, and confirmed in manner hereinafter mentioned, shall be binding on all persons interested in the tithes or lands subject to tithes of the said parish.

Parochial meetings may be called, at which owners of two thirds in value may agree on the sum to be paid to the tithe-owners, which agreement shall bind the whole parish.

XVIII. And be it enacted, that the majority of such land owners and tithe owners present at every such meeting shall elect a chairman, who shall forthwith proceed to ascertain the interest of the land owners and tithe owners then present in person or by their agents; and in case it shall thereupon appear that the persons present at such meeting have not a sufficient interest in the premises as aforesaid to make and execute such an agreement which shall be binding on all persons interested therein, it shall be lawful notwithstanding for any number of the persons then present to make and execute a provisional agreement for the commutation of tithes of the like form and tenor; and every such provisional agreement which shall be executed within six calendar months from the day of the first making thereof by the land owners and tithe owners whose in-

Provisional agreements may be made at the parochial meetings.

terest in the lands and tithes of the parish shall not be less than two-thirds of the lands subject to tithes, two-thirds of the great tithes and two-thirds of the small tithes of the parish respectively, shall be as binding as if executed by all the parties thereto at the meeting at which the agreement was first made.

Proportional interest in lands and tithes how to be estimated for the purposes of this act.

XIX. Provided always, and be it enacted, that the proportional interest of the owners of such lands or tithes, so far as relates to their power to make any such agreement or provisional agreement, or to give any notice to the commissioners or assistant commissioners as hereinafter provided, shall be estimated according to the proportional sum at which such lands or tithes shall be rated to the relief of the poor, or, if there shall be no such rate, according to the rules by which property of the same kind is by law rateable to the relief of the poor.

Meeting may be adjourned.

XX. And be it enacted, that in case an adjournment of the said meeting for any cause shall be desired by a majority of the persons attending such meeting, the chairman shall adjourn the meeting to any time and place then by him to be declared, and so from time to time in case the same shall be in like manner desired by a majority of the persons attending such meeting; and notice of every adjourned meeting shall be given under the hand of the chairman, and shall be affixed in a conspicuous place on the outside of the building in which such meeting or the last adjournment thereof shall have been holden; and the like order of proceeding shall be observed at any such adjourned meeting, and every thing done at any such adjourned meeting shall be as valid as if done at the original meeting.

Form of parochial agreement.

XXI. And be it enacted, that every such agreement shall bear date on the day on which the first signature is attached thereto, and every such agreement or some schedule thereunto annexed shall set forth all the lands of the said parish which are subject to the payment of any kind of tithes, and also the true or estimated quantity in statute measure of land subject to tithes within the parish which shall be then cultivated as arable, meadow, or pasture land, or as wood land, common land, or howsoever otherwise, and shall also set forth whether any modus or composition real, or prescriptive or customary payment, shall be payable instead of all or any of the tithes of the said parish, and which lands or tithes respectively are covered thereby, and shall also set forth which of the said tithes, moduses, compositions, or payments are payable to the tithe owner, or if there is more than one tithe owner to each of the several tithe

owners in the said parish, distinguishing in what right every such tithe owner is entitled to such tithes, and shall also set forth whether any and which of the lands of the said parish are or have been under any and what circumstances exempt from the payment of any and what tithes; and such agreement shall also state in words at length the amount of the sum or sums agreed to be paid (subject to variation as hereinafter provided) instead of the tithes of the lands comprised in the said agreement, and instead of all moduses and compositions real, prescriptive and customary payments (if any), payable in respect of such lands, or the produce of such lands or any of them, distinguishing, if there is more than one tithe owner, the sum payable to every such tithe owner, and where the tithes of different lands in the same parish are payable to different tithe owners, or to the same tithe owner in different rights, distinguishing the sum payable in respect of such different lands; and every such agreement shall also state all such other particulars as the commissioners shall by any order from time to time require to be inserted in such agreements.

Commissioners to frame and circulate forms of agreements, &c.

XXII. And be it enacted, that the commissioners shall frame and cause to be printed, as soon as conveniently may be after their appointment, forms of notices and agreements and such other instruments as in their judgment will further the purposes of this act, and supply all or any of such forms to the churchwardens and overseers of any parish who may require the same, or to whom the commissioners may think fit to send the same, for the use of any land owner or tithe owner desirous of putting this act in execution.

Commissioner or assistant commissioner may attend to advise terms of agreement.

XXIII. And be it enacted, that any commissioner, or assistant commissioner, if the commissioners shall think fit, may attend any such meeting for the purpose of taking part in the discussion and advising on the terms of agreement; but no commissioner or assistant commissioner, during the time that he is actually attending such meeting for that purpose, shall have any of the powers herein given to the commissioners in case of an award or apportionment by the commissioners as hereinafter provided.

Suits and differences may be referred to arbitration.

XXIV. And be it enacted, that if any suit shall be pending touching the right to any tithes, or if there shall be any question as to the existence of any modus or composition real, or prescriptive or customary payment, or any claim of exemption from or non-liability to tithes, under any circumstances in respect of any lands or any kind of produce, or touching the situation or boundary of any lands, or if any difference shall arise whereby the making and executing of

any such agreement shall be hindered, it shall be lawful for the owners, or, if there shall be no owner actually in possession, for the persons claiming to be the owners of the lands and tithes respectively, being parties to such suit or difference, to submit the same to reference by any writing under their respective hands, containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record, upon such terms of reference as the parties may agree upon; and the decision of the arbitrator or arbitrators named in the said reference shall for the purposes of this act be final and conclusive on all persons: Provided nevertheless, that no person being owner of an estate in land or tithes, less in the whole than an immediate estate of fee simple or fee tail, shall be empowered to submit to any such reference so as to bind any person in remainder, reversion, or expectancy, without the consent of the commissioners; and that it shall be lawful for the commissioners, if they shall think fit so to do, but not otherwise necessary, to direct that any person in remainder, reversion, or expectancy of an estate of inheritance in the said lands or tithes, or any other person whom they shall deem to be interested therein, shall be made a party to such reference.

Agreements pending at the time of the passing of this act, if completed and confirmed by the commissioners, to be as valid as parochial agreements.

XXV. And be it enacted, that every agreement for the commutation for a rent charge of the tithes of any lands which shall be pending at the time of the passing of this act, and which shall be executed before or within six calendar months after the passing of this act by the land owners and tithe owners or persons claiming to be such owners, whose interest in the said lands and tithes shall not be less than two-thirds of the said lands, two-thirds of the great tithes and two-thirds of the small tithes of the said lands, and which shall be confirmed by the commissioners, under their hands and seal, in the manner hereinafter provided for the confirmation of any parochial agreement, shall be as valid, and the rent charge agreed to be paid by any such agreement shall be apportioned and charged, as hereinafter provided, among and upon the said lands, as if the agreement had been made and executed at a parochial meeting.

Consent of patron to be given to every agreement for commutation of ecclesiastical tithe.

XXVI. Provided always, and be it enacted, that in every case in which any tithes shall belong to any ecclesiastical person in right of any spiritual dignity or benefice, no agreement for the commutation of such tithes made and executed under this act shall be deemed to be executed by the owner of such tithes unless such consent thereto be given as is hereinafter mentioned; (that is to say,) in the case of an archbishop or bishop, the consent of the Crown signified by the

lord high treasurer or first lord commissioner of the treasury; and in case of the incumbent of any other benefice or ecclesiastical dignity, the consent of the patron or person entitled to present to such benefice or dignity in case the same were then vacant; and every such consent shall be given under the hand of the person giving the same, and shall be annexed to the agreement, and taken to be part of the execution thereof.

Agreement to be confirmed by the commissioners.

XXVII. And be it enacted, that every such agreement, as soon as may be after it shall have been executed by a sufficient number of land owners and tithe owners whose interest in the lands and tithes of the parish respectively shall not be less than two-thirds of the lands subject to tithes, two-thirds of the great tithes and two-thirds of the small tithes, shall be sent by the chairman of the meeting, or by the person in whose custody it shall then be, to the office of the commissioners, and the commissioners, by themselves, or by some assistant commissioner, shall cause inquiry to be made and shall require such proof as will be satisfactory to them, whether or not the agreement has been made without fraud or collusion, and whether or not it ought to be confirmed; and if they shall be satisfied that it ought to be confirmed, the commissioners shall confirm the agreement under their hands and seal, and shall add to such agreement the date of the confirmation, and shall publish the fact of such confirmation and the date thereof within the parish in such manner as to them shall seem fit; and every such confirmed agreement shall be binding on all persons interested in the said lands or tithes.

Agreement to be communicated to bishop of the diocese previous to its being confirmed.

XXVIII. Provided always, and be it enacted, that before the commissioners shall confirm any such agreement relating to tithes belonging to any ecclesiastical person in right of any spiritual dignity or benefice, they shall communicate the same to the bishop of the diocese for his observations and opinion; and no such agreement shall be confirmed by such commissioners until four weeks shall have elapsed from the date of the transmission of such agreement to such bishop, unless the said bishop shall sooner signify his approbation of such agreement to the said commissioners.

Land, not exceeding twenty acres, may be given as commutation for tithes, &c.

XXIX. And be it enacted, that any such parochial agreement may be made in manner and form aforesaid for giving to any ecclesiastical owner, in right of any spiritual benefice or dignity, of any tithes or of any rent charge for which such tithes shall have been commuted, any quantity not exceeding in the whole twenty imperial acres of land by way of commutation for the whole or an equivalent

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part of the great or small tithes of the parish, or in discharge of or exchange for the whole or an equivalent part of any rent charge agreed to be paid instead of such tithes, but subject in every case to the provisions hereinafter contained; and every such agreement shall be made in such form and contain such particulars as the commissioners shall in that behalf direct, specifying the land whereof the tithes or rent charge for which such tithes shall have been commuted shall be the subject of such agreement, and giving full and sufficient descriptions of the quantity, state of culture, and annual value of the land proposed to be given in exchange for such tithes or rent charge: Provided always, that the same consent and confirmation shall be necessary to any such agreement as in the case of an agreement for a rent charge; and that in case the said agreement shall not extend to the whole of the tithes of the parish, an agreement or award as hereinafter provided may and shall be made for the payment of a rent charge in satisfaction of the residue of the said tithes; and such rent charge when agreed upon or awarded, or the residue thereof, shall be apportioned in manner hereinafter provided upon all the lands of the parish subject to the payment of tithes, unless otherwise agreed upon by the parties to the said parochial agreement, except the land so given by way of commutation, in like manner as if no agreement for giving land had been made: Provided also, that the land so given shall be free from incumbrances, except leases at improved rent, land tax, or other usual outgoings, and shall not be of leasehold tenure, nor of copyhold or customary tenure, subject to arbitrary fine or the render of heriots.

Commissioners to satisfy themselves of the title of such land, &c.

XXX. And be it enacted, that in every case in which any such agreement for giving land shall be so entered into, the commissioners shall satisfy themselves, in such way and by such evidence as they shall see fit, of the title to the land proposed thereby to be given in exchange for such tithes or rent charge, and that the same are of the description and value set forth in such agreement, and that such agreement is conformable in every respect to the provisions hereinbefore contained respecting the same; and the expence attending every such agreement for giving land, and the confirmation thereof, and of investigating the title to the land, shall be borne by the owners of land liable to the payment of tithes within the parish, in such proportions as they may agree, or, in default of agreement, as the commissioners may direct.

Agreements for giving land to

XXXI. And be it enacted, that such agreement for giving land, confirmed by the said commissioners, shall operate as a conveyance

of such land to the owner of such tithes or rent charge, and the land so conveyed shall thereupon vest in and be and be deemed to be holden by such person or persons, and upon the like uses and trusts in every respect as the tithes or rent charge in commutation or exchange for which the same shall have been given shall be vested and holden; and for the purpose of making and completing any such agreement the provisions of this act respecting persons under legal disability shall apply to every person party to such agreement or in whom any such land shall be vested, and whose concurrence or consent may be necessary to the perfecting thereof, or of the title to such land, as fully as if the same had been here repeated and re-enacted.

operate as conveyances.

XXXII. And be it enacted, that, at the said meeting or at some adjournment thereof, or at some other parochial meeting to be called in like manner, either before or after the confirmation of the agreement, the owners of lands subject to tithes in the said parish, or their agents, present at the meeting, may appoint a valuer or valuers; and in case the majority in respect of number and the majority in respect of interest shall not agree upon the appointment, then they shall appoint two or such other even number of valuers as shall be then agreed on by such land owners, half of such number to be chosen by a majority in respect of number, and the other half by a majority in respect of interest, of such land owners then present.

Appointment of valuers.

XXXIII. And be it enacted, that as soon as may be after the choosing of such valuer or valuers, and after the confirmation of the said agreement, the valuer or valuers so chosen shall apportion the total sum agreed to be paid by way of rent charge instead of tithes, and the expences of the apportionment amongst the several lands in the said parish, according to such principles of apportionment as shall be agreed upon at the meeting at which the valuer or valuers shall be chosen, or if no principles shall be then agreed upon for the guidance of the valuer or valuers, then, having regard to the average titheable produce and productive quality of the lands, according to his or their discretion and judgment, but subject in each case to the provisions hereinafter contained, and so that in each case the several lands shall have the full benefit of every modus and composition real, prescriptive and customary payment, and of every exemption from or non-liability to tithes relating to the said lands respectively, and having regard to the several tithes to which the said lands are severally liable; provided that it shall be lawful for the said va-

Valuers to apportion the rent charge.

luers, when an even number is chosen, by any writing under their hands, to appoint an umpire before they proceed upon the business of such apportionment, and the decision of the umpire on the questions in difference between the valuers shall be binding on them, and shall be adopted by them in the apportionment.

Valuers may enter on lands for the purpose of valuing tithes.

XXXIV. And be it enacted, that the said valuers and umpire (if it shall become necessary for him to act), and their agents or servants, at all reasonable times, may enter upon any of the lands to be included in the apportionment, and make an admeasurement, plan, and valuation of the same, without being subject to any action or molestation for so doing: Provided always, that no valuer or umpire shall be capable of acting until he shall have made and subscribed before the said commissioners, or some assistant commissioner or justice of the peace, a solemn declaration to the same purport and effect as the oath hereinbefore directed to be made by the said commissioners, substituting only the proper description of such person instead of the word commissioner, and adding to his signature the usual place of his residence, which declaration it shall be lawful for the said commissioners, or any assistant commissioner or justice, to administer; and every such declaration so made and subscribed shall be countersigned by the person before whom the same shall have been made, and shall be sent by him to the office of the commissioners.

Old plans and surveys may be used if the valuers think proper.

XXXV. And be it enacted, that the valuer or valuers or umpire may, if they think fit, use for the purposes of this act any admeasurement, plan, or valuation previously made of the lands or tithes in question of the accuracy of which they shall be satisfied; and that it shall be lawful for the meeting at which such valuer or valuers shall be chosen to agree upon the adoption for the purposes aforesaid of any such admeasurement, plan, or valuation, and such agreement shall be binding upon the valuer or valuers; provided always, that three-fourths of the land owners in number and value shall concur therein.

After 1st Oct. 1838, commissioners may ascertain total value of tithes in any parish in which no previous agreement has been made.

XXXVI. And be it enacted, that, after the first day of October one thousand eight hundred and thirty-eight, the commissioners shall proceed in manner hereinafter mentioned, at such time and in such order as to them shall seem fit, either by themselves or by some assistant commissioner, to ascertain and award the total sum to be paid by way of rent-charge instead of the tithes of every parish in England and Wales in which no such agreement binding upon the whole parish as aforesaid shall have been made and confirmed as aforesaid: Provided nevertheless, that if any proceeding shall be had

towards making and executing any such agreement after the commissioners shall have given or caused to be given notice of their intention to act as aforesaid in such parish, the commissioners may refrain from acting upon such notice, if they shall think fit, until the result of such proceeding shall appear.

Value of tithes to be calculated upon an average of seven years.

XXXVII. And be it enacted, that in every case in which the commissioners shall intend making such award, notice thereof shall be given in such manner as to them shall seem fit; and after the expiration of twenty-one days after such notice shall have been given the commissioners or some assistant commissioner shall, except in the cases for which provision is hereinafter made, proceed to ascertain the clear average value (after making all just deductions on account of the expences of collecting, preparing for sale, and marketing, where such tithes have been taken in kind,) of the tithes of the said parish, according to the average of seven years preceding Christmas in the year one thousand eight hundred and thirty-five: Provided that if during the said period of seven years, or any part thereof, the said tithes or any part thereof shall have been compounded for or demised to the owner or occupier of any of the said lands in consideration of any rent or payment instead of tithes, the amount of such composition or rent or sum agreed to be paid instead of tithes shall be taken as the clear value of the tithes included in such composition, demise, or agreement during the time for which the same shall have been made; and the commissioners or assistant commissioner shall award the average annual value of the said seven years so ascertained as the sum to be taken for calculating the rent-charge to be paid as a permanent commutation of the said tithes: Provided also, that whenever it shall appear to the commissioners that the party entitled to any such rent or composition shall in any one or more of the said seven years have allowed and made any abatement from the amount of such rent or composition on the ground of the same having in any such year or years been higher than the sum fairly payable by way of composition for the tithe, but not otherwise, then and in every such case such diminished amount, after making such abatement as aforesaid, shall be deemed and taken to have been the sum agreed to be paid for any such year or years: Provided also, that in estimating the value of the said tithes the commissioners or assistant commissioner shall estimate the same without making any deduction therefrom on account of any parliamentary, parochial, county, and other rates, charges, and assessments to which the said tithes are liable; and whenever the said tithes shall

Tithes to be valued without deduction on account of parochial and county rates, &c.

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have been demised or compounded for on the principle of the rent or composition being paid free from all such rates, charges, and assessments, or any part thereof, the said commissioners or assistant commissioner shall have regard to that circumstance, and shall make such an addition on account thereof as shall be an equivalent.

Commissioners in certain cases may increase or diminish the sum to be paid for commutation.

XXXVIII. Provided always, and be it enacted, that in case notice in writing under the hand of any patron, or the hands of any land owners or tithe owners whose interest in the lands or tithes of the parish shall not be less than one half of the lands subject to tithes, one half of the great tithes or one half of the small tithes of the parish shall be given to the commissioners or assistant commissioner acting in that behalf, within one calendar month next after the notice of the intention to make an award shall have been given as aforesaid, that the average value to be ascertained as aforesaid will not fairly represent the sum which ought to be taken for calculating a permanent commutation of the great or small tithes of the said parish, the commissioners shall have power to diminish or increase the sum to be so taken by a sum amounting to not more than one-fifth part of the average value ascertained as aforesaid: Provided always, that every case which shall appear to the commissioners to be fraudulent or collusive, or which, by reason of the length of time which shall have elapsed since the making of any composition then in force, or which by reason of the peculiar interest in the lands or tithes of either of the parties to any composition, or by reason of any other special circumstances, ought in the judgment of the commissioners to be separately adjudicated upon, shall be reserved for separate adjudication as hereinafter provided; and the commissioners shall certify and report to one of his Majesty's principal secretaries of state, under their hands and seals, before the first day of May in the year one thousand eight hundred and thirty-eight, in what manner the discretion hereby vested in them ought in their judgment to be exercised, and shall in the said report lay down such rules for the guidance of the assistant commissioners as may to them seem expedient; and such report shall be laid before parliament within six weeks after the same shall have been received or after the meeting of parliament, and, unless parliament shall otherwise provide, such rules shall be observed by the said commissioners and assistant commissioners in the exercise of the discretion hereby vested in the commissioners.

Special adjudi-

XXXIX. And be it enacted, that the commissioners shall from

time to time report to one of his Majesty's principal secretaries of state, under their hands and seals, all the cases which under the power hereinbefore reserved to them in that behalf shall have been reserved for separate adjudication, and shall state in every such report the reasons for so reserving every case mentioned therein, and the commissioners shall in every such case award the rent-charge to be paid as a permanent commutation for tithes, having regard to the average rate which shall be awarded in respect of lands of the like description and similarly situated in the neighbouring parishes: Provided always, that a draught of such intended award, with a copy of so much of the said report as is applicable to such award, shall be deposited in the parish; and the commissioners, or an assistant commissioner to be specially appointed by the commissioners for that purpose, shall hear and determine all objections to the award in the like manner as is herein provided in an ordinary case of award, and the commissioners shall have power thereupon to amend the draught of the said award accordingly.

cations how to be made.

XL. And be it enacted, that in case any of the lands in the parish shall be hop grounds, orchards, or gardens, and notice shall be given by the owner thereof to the commissioners or assistant commissioner acting in that behalf that the tithes thereof should be separately valued, the commissioners or assistant commissioner shall estimate the value of the tithes thereof according to the average rate of composition for the tithes of hops, fruit, and garden produce respectively during seven years preceding Christmas in the year one thousand eight hundred and thirty-five, within a district to be assigned in each case by the commissioners or assistant commissioner, and estimating the same as chargeable to all parliamentary, parochial, county, and other rates, charges, and assessments to which the said tithes are liable, and shall add the value so estimated to the value of the other tithes of the parish ascertained as aforesaid.

How the tithe of hops, fruit, and garden produce is to be valued.

XLI. And be it enacted, that in case any of the lands in the parish shall be coppices, and notice shall be given by the owner thereof, or by the owner of the tithes thereof, to the commissioners or assistant commissioner acting in that behalf, that the tithes thereof should be separately valued, the commissioners or assistant commissioner shall estimate the value of the tithes thereof with a due regard to the average value, estimated according to the best of their judgment, of coppice wood of the same kind cut during the said period of seven years in that parish and the neighbouring parishes, estimating the same as chargeable to all parliamentary, parochial, county, and

How the tithe of coppice wood is to be valued.

other rates, charges, and assessments to which the said tithes are liable, and shall add the clear value of the tithes so estimated to the value of the other tithes of the parish ascertained as aforesaid; and the commissioners shall, in the report which they are hereinbefore required to make to one of his Majesty's principal secretaries of state before the first day of May in the year one thousand eight hundred and thirty-eight, lay down rules for the guidance of the assistant commissioners in estimating the value of the tithes of coppice wood, and, unless parliament shall otherwise provide, such rules shall be observed by the said commissioners and assistant commissioners.

Provision for the change of culture of hop grounds and market gardens.

XLII. And be it enacted, that the amount which shall be charged by any such apportionment as hereinafter provided upon any hop grounds or market gardens in any district so to be assigned shall be distinguished into two parts, which shall be called the ordinary charge and the extraordinary charge, and the extraordinary charge shall be a rate per imperial acre, and so in proportion for less quantities of ground, according to the discretion of the valuers or commissioners or assistant commissioner by whom the apportionment shall be made as aforesaid; and all lands whereof the tithes shall have been commuted under this act, and which shall cease to be cultivated as hop grounds or market gardens at any time after such commutation, shall be charged, after the thirty-first day of December next following such change of cultivation, only with the ordinary charge upon such lands; and all lands in any such district the tithes whereof shall have been commuted under this act, and which shall be newly cultivated as hop grounds or market gardens at any time after such commutation, shall be charged with an additional amount of rent-charge per imperial acre, equal to the extraordinary charge per acre upon hop grounds or market gardens respectively in that district: Provided always, that no such additional amount shall be charged or payable during the first year, and half only of such additional amount during the second year, of such new cultivation; and an additional rent-charge by way of extraordinary charge upon hop grounds and market gardens, newly cultivated as such beyond the limits of every district in which any extraordinary charge for hop grounds or market gardens respectively shall have been distinguished as aforesaid at the time of the commutation, shall be charged by the commissioners at the time of such new cultivation, upon the request of any person interested therein, if such new cultivation

shall have taken place during the continuance of the commission of the said commissioners, and after the expiration of the commission shall be charged in such manner and by such authority as parliament shall direct, and shall be payable and recoverable in like manner and subject to the same incidents in all respects as an extraordinary charge charged upon any hop grounds or market gardens at the time of commutation.

Provision for valuing tithes of lands to which the average of seven years cannot apply.

XLIII. And be it enacted, that in case any of the lands in the parish shall, during any part of the said period of seven years preceding Christmas in the year one thousand eight hundred and thirty-five, have been exempted from payment of tithes by reason of having been inclosed under any act of parliament, or converted from barren heath or waste ground, or by reason of being glebe lands or of having been heretofore parcel of the possessions of any privileged order, and notice shall have been given as last aforesaid to the commissioners or assistant commissioner acting in that behalf, that the tithes thereof should be separately valued, the commissioners or assistant commissioner shall estimate the value of the tithes thereof according to the average value which shall be ascertained as aforesaid in respect of lands of the like description and quality in that parish and the neighbouring parishes, or as near thereto as the circumstances of each case may in their judgment require, and estimating the same as chargeable to all parliamentary, parochial, county, and other rates, charges, and assessments to which the said tithes are liable, and shall add the value so estimated to the value of the other tithes of the parish ascertained as aforesaid.

Moduses, &c. how to be allowed for in the award.

XLIV. And be it enacted, that if any modus or composition real, or prescriptive or customary payment, shall be payable instead of the tithes of any of the lands or produce thereof in the said parish, the commissioners or assistant commissioner shall in such case estimate the amount of such modus, composition, or payment as the value of the tithes payable in respect of such lands or produce respectively, and shall add the amount thereof to the value of the other tithes of the parish ascertained as aforesaid, and shall also make due allowance for all exemptions from or non-liability to tithes of any lands or any part of the produce of such lands: Provided also, that if it shall appear to the said commissioners or assistant commissioner that any question concerning any modus or composition real, prescriptive or customary payment, or claim of exemption from or non-liability to the payment of tithes relating to the lands in question, shall have been decided by competent authority before

the making of the said award, the commissioners or assistant commissioners shall act on the principle established by such decision, and shall make their award as if such decision had been made at the beginning of the said period of seven years.

Commissioners may hear and determine disputes;

XLV. And be it enacted, that if any suit shall be pending touching the right to any tithes, or if there shall be any question as to the existence of any modus or composition real, or prescriptive or customary payment, or any claim of exemption from or non-liability under any circumstances to the payment of any tithes in respect of any lands or any kind of produce, or touching the situation or boundary of any lands, or if any difference shall arise whereby the making of any such award by the commissioners or assistant commissioner shall be hindered, it shall be lawful for the commissioners or assistant commissioner to appoint a time and place in or near the parish for hearing and determining the same; and the decision of the commissioners or assistant commissioner shall be final and conclusive on all persons, subject to the provisions herein-after contained.

subject to appeal by an issue at law;

XLVI. Provided always and be it enacted, that any person claiming to be interested in any lands or in the tithes thereof who shall be dissatisfied with any such decision of the commissioners or assistant-commissioner may, if the yearly value of the payment to be made or withholden according to such decision shall exceed the sum of twenty pounds, cause an action to be brought in any of his Majesty's courts of law at Westminster against the person in whose favour such decision shall have been made, within three calendar months next after such decision shall have been notified in writing, in such manner as the commissioners or assistant commissioner shall direct, to the parties interested therein or to their known agents, in which action the plaintiff shall deliver a feigned issue, whereby such disputed right may be tried, and shall proceed to a trial at law of such issue at the sittings after the term or at the assizes then next or next but one after such action shall have been commenced to be holden for the county within which such lands or the greater part thereof are situated, with liberty nevertheless for the court in which the same shall have been commenced or any judge of His Majesty's courts of law at Westminster to extend the time for going to trial therein, or to direct the trial to be in another county if it shall seem fit to such court or judge so to do; and every defendant in any such action shall enter an appearance thereto, and accept such issue; but in case the parties shall differ as to the form of such issue, or in case the defendant shall fail to enter such appearance

or accept such issue, then the same shall be settled under the direction of the court in which the action shall be brought, or by any judge of His Majesty's courts of law at Westminster, and the plaintiff may proceed thereon in like manner as if the defendant had appeared and accepted such issue; and the parties in such action shall produce to each other and their respective attornies or counsel, at such time and place as any judge may order before trial, and also to the court and jury upon the trial of any such issue, all books, deeds, papers, and writings, terriers, maps, plans, and surveys relating to the matters in issue in their respective custody or power; and it shall be lawful for the judge by whom any such action shall be tried, if he shall think fit, to direct the jury to find a verdict, subject to the opinion of the court upon a special case; and the verdict which shall be given in any such action, or the judgment of the court upon the case subject to which the same may be given, shall be final and binding upon all parties thereto, unless the court wherein such action shall be brought shall set aside such verdict and order a new trial to be had therein, which it shall be lawful for the said court to do, if it shall see fit: Provided also, that in case any such decision shall involve a question of law only, and the parties in difference shall be agreed upon the facts relating thereto, and whereon such decision shall have been founded, the said commissioners or assistant commissioner, at the request of the person dissatisfied, (such request to be made in writing within three calendar months after such decision, and at least fourteen days previous notice in writing of such request to be given in like manner to the other parties in difference or to their known agents,) shall direct a case to be stated for the opinion of such one of His Majesty's courts of law at Westminster as the commissioners or assistant commissioner shall think fit, which case shall be settled by them or him or under their or his direction in case the parties differ about the same, and may be set down for argument and be brought before the court in like manner as other cases are brought before the court; and the decision of such court upon every case so brought before it shall be binding upon all parties concerned therein: Provided always, that after such verdict given and not set aside by the court, or after such decision of the court, the said commissioners or assistant commissioner shall be bound by such verdict or decision; and the costs of every such action, or of stating such case and obtaining a decision thereon, shall be in the discretion of the court in or by which the same shall be decided, which may order the same

or by taking the opinion of a court of law thereon,

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to be taxed by the proper officer of the court, and the like execution may be had for the same as if such costs had been recovered upon a judgment of record of the said court.

Proceedings not to abate by death of parties.

XLVII. And be it enacted, that no proceeding of or before the commissioners or any assistant commissioner, or in any action, or in any case stated, or reference in pursuance of this act, shall abate or cease by reason of the death of any person interested therein.

In case of deaths of parties before actions brought, &c. the same to be carried on and defended in their names.

XLVIII. And be it enacted, that if any person in whose favour any such decision of the commissioners or any assistant commissioner shall have been made shall die before any such action shall have been brought or case stated, and before the expiration of the time herein-before limited for that purpose, it shall be lawful for every person who might have brought such action, or have had such case stated, against the person so dying, to bring or have the same, within the time so limited as aforesaid, nominally against such person as if living, and to serve the said commissioners or assistant commissioner with process and notices relating thereto in the same manner as the person deceased might have been served therewith if living; and it shall be lawful for every person entitled to the benefit of such decision as aforesaid, or, in case of any such person being a minor, idiot, lunatic, feme covert, beyond the seas, or under any other legal disability, the guardian, trustee, committee of the estate, husband, or attorney respectively, or in default thereof such person as may be nominated for that purpose by the commissioners, and whom they are hereby empowered to nominate under their hands and seal, to appear and defend such action or argue such case; and proceedings shall be had therein in the same manner, and the rights of all persons shall be equally bound and concluded by the event of such action or the decision upon such case, as if such person had been living; and the costs of every such action or case shall be in the discretion of the court as aforesaid.

Statutes of limitation not to be affected.

XLIX. Provided always, and be it enacted, that nothing in this act contained shall revive any right to tithes which now is or hereafter shall be barred by any law in force for shortening the time required in claims of modus decimandi or exemption from or discharge from tithes, or for the limitation of actions and suits relating to real property.

Commissioners to award total sum to be paid for the tithes of the parish.

L. And be it enacted, that as soon as all such suits and differences shall have been decided, or if there shall have been no suits or differences then as soon as the commissioners or assistant commissioners shall have ascertained and estimated as aforesaid the total value of

all the tithes of the said parish, the commissioners or assistant commissioner shall frame the draft of an award, declaring that the sum ascertained as aforesaid shall be the amount of the rent-charge to be paid in respect of the tithes of the said parish, and every such draft shall contain all the particulars hereinbefore required to be inserted in any parochial agreement or any schedule thereto: Provided always, that no such award shall be made for giving land instead of the tithes of the parish.

Commissioners may hear and determine objections to the award.

LI. And be it enacted, that as soon as the said draft shall have been made by the commissioners or assistant commissioner they or he shall deposit a copy of the same and of any special report thereunto annexed at some convenient place within the said parish for the inspection of all persons interested in the said lands or tithes, and shall forthwith give notice in such manner as to the commissioners shall seem fit where the said copy may be inspected, and shall also in such notice appoint some convenient place and time (the first not earlier than twenty-one days from the first giving of such notice) for holding a meeting to hear objections to such intended award by any person interested therein; and the said commissioners or assistant commissioner at such meeting as aforesaid shall hear and determine any objections which may be then and there made to the said intended award, or adjourn the further hearing thereof, if they or he shall think proper, to a future meeting, and may, if they or he shall see occasion, direct any further valuation of the lands or tithes or any of them, and from time to time fix further meetings for the hearing and determining of objections, of which further meetings, when not holden by adjournment, notice shall be given in manner herein-before directed with regard to the original meeting; and when the said commissioners or assistant commissioner shall have heard and determined all such objections, they or he shall amend the draft of such award accordingly, if they or he shall see occasion.

Award to be confirmed by the commissioners.

LII. And be it enacted, that as soon as the commissioners or assistant commissioner shall have made such amendments in the draft of the award as to them or him shall seem necessary, they or he shall cause the same to be fairly written, and shall sign and send it to the office of the commissioners, and the commissioners shall satisfy themselves that all the proceedings incident to the making of such award have been duly performed, and if they shall think that the award ought to be confirmed shall confirm the same under their hands and seal, and shall add to the award the date of such confirmation, and shall publish the fact of such confirmation and the

date thereof in the parish, in such manner as to them shall seem fit; and every such confirmed award shall be binding on all persons interested in the said lands or tithes.

Commissioners to summon a parochial meeting to appoint valuers.

LIII. And be it enacted, that as soon as the commissioners shall have confirmed any such award, the commissioners or some assistant commissioner shall call a parochial meeting of the owners of land subject to tithes in the said parish, for the purpose of choosing valuers to apportion the amount so awarded among the lands of the parish, and shall give notice thereof in writing under their or his hand, to be fixed at least twenty-one days before such meeting on the principal outer door of the church or in some public and conspicuous place within the parish; and valuers or a single valuer may be chosen at such meeting by the land owners then present in like manner, and the valuers so chosen shall act with the same powers and be subject to the same provisions, as if the rent-charge so awarded had been agreed to at a parochial meeting of the land owners and tithe owners of the parish, and the valuers had been thereupon chosen as aforesaid.

If valuation not completed in six months commissioners to apportion.

LIV. And be it enacted, that if upon the expiration of six calendar months after the day of the date of the confirmation of any agreement or award no valuer or valuers shall have been appointed, or the apportionment by such valuers or valuer shall not have been made and sent to the office of the commissioners as herein-after provided, it shall be lawful for the commissioners or some assistant commissioner to apportion the rent-charge previously agreed or awarded to be paid among the lands of the said parish, having regard to the average titheable produce and productive quality of the said lands, according to the discretion and judgment of the commissioners or assistant commissioner, but subject to the provisions herein-after contained, and so that the several lands may have the full benefit in each case of every modus, composition real, prescriptive and customary payment, and of every exemption from or non-liability to tithes relating to the said lands respectively, and having regard to the several tithes to which the said lands are severally liable.

Form of apportionment.

LV. And be it enacted, that a draught of every apportionment shall be made, and shall set forth the agreement or award, as the case may be, upon which such apportionment is founded, and every schedule thereunto annexed; and the said draught, or some schedule thereunto annexed, whether made by or under the direction of the valuers or commissioners or assistant commissioners, shall state the

name or description and the true or estimated quantity in statute measure of the several lands to be compriged in the apportionment, and shall set forth the names and description of the several proprietors and occupiers thereof, and whether the said several lands are then cultivated as arable, meadow, or pasture land, or as wood land, common land, or howsoever otherwise, and shall refer, by a number set against the description of such lands, to a map or plan to be drawn on paper or parchment, and the same number shall be marked on the representation of such lands in the said map or plan; and the draught of the apportionment shall also state the amount charged upon the said several lands, and to whom and in what right the same shall be respectively payable.

Comptroller of corn returns to publish average price of corn.

LVI. And be it enacted, that immediately after the passing of this act, and also in the month of January in every year, the comptroller of corn returns for the time being, or such other person as may from time to time be in that behalf authorized by the privy council, shall cause an advertisement to be inserted in the London Gazette, stating what has been, during seven years ending on the Thursday next before Christmas day then next preceding, the average price of an imperial bushel of British wheat, barley, and oats, computed from the weekly averages of the corn returns.

Rent-charges to be valued according to the average price of corn.

LVII. And be it enacted, that every rent-charge charged upon any lands by any such intended apportionment shall be deemed at the time of the confirmation of such apportionment, as hereinafter provided, to be of the value of such number of imperial bushels and decimal parts of an imperial bushel of wheat, barley, and oats as the same would have purchased at the prices so ascertained by the advertisement to be published immediately after the passing of this act, in case one third part of such rent-charge had been invested in the purchase of wheat, one third part thereof in the purchase of barley, and the remaining third part thereof in the purchase of oats, and the respective quantities of wheat, barley, and oats so ascertained shall be stated in the draft of every apportionment.

Rent-charge may be specially apportioned.

LVIII. And be it enacted, that it shall be lawful for the valuers or commissioners or any assistant commissioner, upon the request of any land owner, at any time before the confirmation of the apportionment, to apportion the whole rent-charge intended to be charged upon any lands of such land owner held under the same title and for the same estate, in the same parish, specially upon the several closes or portions of such lands or according to an acreable rate or acreable rates, upon lands of different quality, in such manner and

in such proportion, and to the exclusion of such of them, as the land owner, with the consent of the person entitled to such rent-charge, may direct, and the particulars of every such special apportionment shall be included in the draught of the apportionment and taken to be a part thereof: Provided always, that the extra expences of every such special apportionment shall be borne by the party at whose instance the same shall have been made, and shall be recoverable as other costs of the apportionment are recoverable, and that no close of land shall be charged with any rent-charge or share of rent-charge on account of the tithes of any other lands, unless the value of such lands shall be at least three times the value of the whole rent-charge upon such lands.

Commissioners may employ surveyors.

LIX. And be it enacted, that for the purpose of making any such apportionment, as well as for the purpose of making any award as herein-before provided, the commissioners and assistant commissioners may employ such land surveyors and tithe valuers as to them shall seem fit, and may order them to be paid for valuing, surveying, mapping, and planning after any rate not exceeding two guineas to every such person for every day that he shall have been so employed, and may assess the same as part of the expenses of making their award or apportionment respectively; and the said commissioners and assistant commissioners, and the land surveyors and tithe valuers employed by them respectively, shall have all the powers and be subject to all the provisions hereinbefore enacted concerning the valuers appointed at a parochial meeting, except that they shall not be bound to adopt any principles of apportionment agreed to at any parochial meeting: Provided always, that it shall be lawful for such commissioners and assistant commissioners to make any agreement with any such land surveyors or tithe valuers for the payment to the same of one sum for the whole duty or any part thereof to be performed by them respectively.

Commissioners to have the power of valuers as to entry in lands, &c.

Apportionment to be signed by the person making it, and sent with the plan to the commissioners.

LX. And be it enacted, that the draught of every apportionment, whether made by or under the direction of the commissioners or any assistant commissioner or by any valuer or valuers appointed as herein-before is provided, shall be signed by the person by or under whose direction it shall have been made, and shall be sent, together with the map or plan therein referred to, by the person by whom it is signed to the office of the commissioners or otherwise to some assistant commissioner, as the commissioners may direct, with such proof as the commissioners may require that every proceeding incident to the making of such draught of apportionment has been duly performed.

Commissioners may hear and determine objections to apportionment.

LXI. And be it enacted, that as soon as the draught of any such apportionment, verified as aforesaid, shall have been sent to the commissioners, they shall cause a copy of the same to be deposited at some convenient place within the said parish for the inspection of all persons interested in the said lands or tithes, and shall forthwith cause notice to be given, in such manner as to them shall seem fit, where the said copy may be inspected, and shall also in such notice appoint some convenient place and such times as they shall think necessary (the first not earlier than twenty-one days from the first giving of such notice), for holding a meeting to hear objections to the intended apportionment by any person interested therein, and the said commissioners or some assistant commissioner at such meeting as aforesaid shall hear and determine any objections which may be then and there made to the said intended apportionment, or adjourn the further hearing thereof, if they or he shall think proper, to a future meeting, and may, if they or he shall see occasion, direct any further valuation of the lands or any of them, and from time to time fix further meetings for the hearing and determining of objections, of which further meetings, when not holden by adjournment, notice shall be given in manner herein-before directed with regard to the original meeting; and when the said commissioners or assistant commissioner shall have heard and determined all such objections, they and he are and is hereby required to cause such apportionment to be amended accordingly if they or he shall see occasion.

Owners of lands chargeable with rent-charge may give land instead thereof.

LXII. And be it enacted, that it shall be lawful for the owner of any lands chargeable with any such rent-charge to agree, at any time before the confirmation of any such instrument of apportionment, with any ecclesiastical person being the owner of the tithes thereof in right of any spiritual benefice or dignity, for giving land instead of the rent-charge charged or about to be charged upon his lands; and every such agreement shall be made under the hands and seals of the land owner and tithe owner, and shall contain all the particulars herein-before required to be inserted in a parochial agreement for giving land instead of tithes or rent-charge: Provided always, that no such tithe owner shall be enabled to take or hold more than twenty imperial acres of land in the whole by virtue of any such agreement or agreements made in the same parish; and the same consent and confirmation relatively to the lands and tithes comprised in the said agreement shall be necessary to any such agreement as in the case of a parochial agreement for giving

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land instead of tithes; and all the provisions herein-before contained concerning a parochial agreement for giving land shall be applicable to every such agreement as herein-before last mentioned, so far as concerns the lands and tithes comprised in the said agreement: Provided also, that any amendment which shall be made in the draft of apportionment before confirmation thereof, and subsequent to any such agreement for giving land instead of rent-charge, whereby the charge upon the lands referred to in such agreement shall be altered, shall be taken to annul the execution of such agreement for giving land, and any consent which may have been necessary thereunto.

Confirmation by the commissioners.

LXIII. And be it enacted, that after such proceedings as aforesaid shall have been had, and all such objections, if any, shall have been finally disposed of, the commissioners or assistant commissioner shall cause the instrument of apportionment to be ingrossed on parchment, and shall annex the map or plan thereunto belonging to the ingrossed instrument of apportionment, and shall sign the instrument of apportionment, and the map or plan, and shall send both to the office of the commissioners, and if the commissioners shall approve the apportionment they shall confirm the instrument of apportionment under their hands and seal, and shall add thereunto the date of such confirmation.

Transcripts of the award to be sent to the registrar of the diocese and to the incumbent and churchwardens.

LXIV. And be it enacted, that two copies of every confirmed instrument of apportionment, and of every confirmed agreement for giving land instead of any tithes or rent-charge, shall be made and sealed with the seal of the said commissioners, and one such copy shall be deposited in the registry of the diocese within which the parish is situated, to be there kept among the records of the said registry, and the other copy shall be deposited with the incumbent and church or chapel wardens of the parish for the time being, or such other fit persons as the commissioners shall approve, to be kept by them and their successors in office with the public books, writings, and papers of the parish, and all persons interested therein may have access to and be furnished with copies of or extracts from any such copy on giving reasonable notice to the person having custody of the same, and on payment of two shillings and sixpence for such inspection, and after the rate of three-pence for every seventy-two words contained in such copy or extract; and every recital or statement in or map or plan annexed to such confirmed apportionment or agreement for giving land, or any sealed copy thereof, shall be deemed satisfactory evidence of the matters therein recited or stated, or of the accuracy of such plan.

LXV. And be it enacted, that the commissioners, if they shall see fit, before confirming any agreement, award, or apportionment, may require notice thereof to be given in such manner as they shall direct to the person next in remainder, reversion, or expectancy of an estate of inheritance in any lands or tithes, or any other person to whom they may think notice ought to be given, and may by themselves or by some assistant commissioner hear and determine any objection made to such confirmation by any person interested therein, and may direct any award or apportionment to be amended accordingly.

Commissioners may require notice of agreements or awards to be given to reversioner.

LXVI. And be it enacted, that no confirmed agreement, award, or apportionment shall be impeached after the confirmation thereof by reason of any mistake or informality therein or in any proceeding relating thereunto.

Agreements, &c. not to be questioned after confirmation.

LXVII. And be it enacted, that from the first day of January next following the confirmation of every such apportionment the lands of the said parish shall be absolutely discharged from the payment of all tithes, except so far as relates to the liability of any tenant at rack rent dissenting as herein-after provided, and instead thereof there shall be payable thenceforth to the person in that behalf mentioned in the said apportionment a sum of money equal in value, according to the prices ascertained by the then next preceding advertisement, to the quantity of wheat, barley, and oats respectively mentioned therein to be payable instead of the said tithes, in the nature of a rent-charge issuing out of the lands charged therewith; and such yearly sum shall be payable by two equal half-yearly payments on the first day of July and the first day of January in every year, the first payment, except in the case of barren reclaimed lands, as hereinafter provided, being on the first day of July next after the lands shall have been discharged from tithes as aforesaid, and such rent-charge may be recovered at the suit of the person entitled thereto, his executors or administrators, by distress and entry as herein-after mentioned; and after every first day of January the sum of money thenceforth payable in respect of such rent-charge shall vary so as always to consist of the price of the same number of bushels and decimal parts of a bushel of wheat, barley, and oats respectively, according to the prices ascertained by the then next preceding advertisement, and any person entitled from time to time to any such varied rent-charge shall have the same powers for enforcing payment thereof as are herein contained concerning the original rent-charge: Provided always, that nothing herein contained shall be taken to render any person whomsoever

Lands to be discharged from tithes, and rent-charge paid in lieu thereof.

personally liable to the payment of any such rent-charge: Provided always, that the rent-charge which shall be apportioned upon any lands in the said parish which during any part of the said period of seven years preceding Christmas one thousand eight hundred and thirty-five were exempted from tithes by reason of having been inclosed under any act of parliament, or converted from barren heath or waste ground, shall be payable for the first time on the first day of July or first day of January next following the confirmation of the apportionment which shall be nearest to the time at which tithes were or would have become payable for the first time in respect of the said lands if no commutation thereof had taken place.

Payment of rent-charge on reclaimed lands to be postponed until tithes would have been due.

LXVIII. And be it enacted, that from the first day of January next following the confirmation of every parochial or other agreement for giving land instead of any tithes or rent-charge, the lands of the parish in which any such agreement shall be made shall be absolutely discharged from the payment of the tithes or rent-charge for which it shall have been agreed that such land shall be given.

Lands to be free from tithes when lands are given in lieu thereof.

LXIX. And be it enacted, that every rent-charge payable as aforesaid instead of tithes shall be subject to all parliamentary, parochial, and county and other rates, charges, and assessments, in like manner as the tithes commuted for such rent-charge have heretofore been subject.

Rent-charge to be liable to parochial and county rates.

LXX. And be it enacted, that all rates and charges to which any such rent-charge is liable shall be assessed upon the occupier of the lands out of which such rent-charge shall issue, and in case the same shall not be sooner paid by the owner of the rent-charge for the time being, may be recovered from such occupier in like manner as any poor rate assessed on him in respect of such lands; and any occupier holding such lands under any landlord and who shall have paid any such rate or charge in respect of any such rent-charge shall be entitled to deduct the amount thereof from the rent next payable by him to his landlord for the time being, and shall be allowed the same in account with his landlord; and any landlord or owner in possession, who shall have paid any such rate or charge, or from whose rent the amount of any such rate or charge in respect of any such rent-charge shall have been so deducted, or who shall have allowed the same in account with any tenant paying the same, shall be entitled to deduct the amount thereof from the rent-charge, or by all other lawful ways and means to recover the same from the owner of the rent-charge, his executors and administrators; provided that the owner of every such rent-charge shall have and be entitled to the

How rates and charges are to be recovered.

like right of demanding, inspecting, and taking copies of every assessment containing such rate or charge, and of appeal against the same, and the like power of prosecuting such appeal, and the like remedies in respect thereof, as any occupier or rate-payer has or may have in the case of poor rates, although such rate or charge is herein made assessable upon the occupier, and the owner of the rent-charge is not mentioned by name in such assessment.

Rent-charge to be subject to the same incumbrances and incidents as tithe before this act.

LXXI. And be it enacted, that any person having any interest in or claim to any tithes, or to any charge or incumbrance upon any tithes, before the passing of this act, shall have the same right to or claim upon the rent-charge for which the same shall be commuted as he had to or upon the tithes, and shall be entitled to have the like remedies for recovering the same as if his right or claim to or upon the rent-charge had accrued after the commutation: Provided that nothing herein contained shall give validity to any mortgage or other incumbrance which before the passing of this act was invalid or could not be enforced; and every estate for life, or other greater estate, in any such rent-charge, shall be taken to be an estate of freehold; and every estate in any such rent-charge shall be subject to the same liabilities and incidents as the like estate in the tithes commuted for such rent-charge; and where any lands were exempted from tithe whilst in the occupation of the owner thereof by reason of being glebe or of having been heretofore parcel of the possessions of any privileged order, the same lands shall be in like manner exempted from the payment of the rent-charge apportioned on them whilst in the occupation of the owner thereof; and where by virtue of any act or acts of parliament heretofore passed any tithes are authorized to be sold, exchanged, appropriated, or applied in any way, the rent-charges for which such tithes may be commuted under the provisions of this act, or any part thereof, shall or may be saleable or exchangeable, appropriated and applied, to all intents and purposes, in like manner as such tithes, and the same powers of sale, exchange, and appropriation shall in all such cases extend to and may be exercised in respect of the said commutation rent-charges; and the money to arise by the sale of such rent-charges shall or may be invested, appropriated, and applied, to the same purposes and in like manner as the money to arise by the sale of any such tithes might have been invested, appropriated, and applied under such particular act or acts in case this act had not been passed; and no such rent-charge shall merge or be extinguished in any estate of which the person for the time being entitled to such

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rent-charge may be seised or possessed in the lands on which the same shall be charged: Provided always, that it shall be lawful for any person seised in possession of an estate in fee simple or fee tail of any tithes or rent-charge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the said commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands on which the same shall have been charged.

Proviso.

Apportionment may be altered by commissioners of land tax, if desired.

LXXII. And be it enacted, that if at any time subsequent to the confirmation of any such instrument of apportionment the owner of any lands charged with any such rent-charge shall be desirous that the apportionment thereof shall be altered, it shall be lawful for the commissioners of land tax for the county or place where the said lands are situate, or any three of them, to alter the apportionment in such manner and in such proportion and to the exclusion of such of the lands as the land owner, with the consent of two justices of the peace acting for the county, riding, division, or other jurisdiction in which the lands are situated, may direct; and such altered apportionment shall be made by an instrument in writing under the hands and seals of the said commissioners of land tax and of the said land owner and justices, of the like form and tenor as to the said lands as the original apportionment, and bearing date the day of its execution by the said commissioners of land tax, subject to the provision hereinbefore contained with respect to the value of lands on which any rent-charge may be charged on account of the tithes of any other lands; and every such altered apportionment shall be as valid as if made and confirmed by the tithe commissioners as aforesaid, and shall be taken to be an amendment of the original apportionment; and in every such case two counterparts of the instrument of altered apportionment, under the hands and seals of the said commissioners of land tax and justices and land owner, shall be sent, one to the registrar of the diocese, and one to the incumbent and church or chapel wardens, or other person having the custody of the other copy of the original instrument of apportionment; and one counterpart shall be annexed to the copy of the instrument of apportionment in the custody of the registrar and such other person respectively, and taken to be an amendment thereof; and thenceforward such lands shall be charged only according to such altered apportionment; and all expenses of such alteration shall be borne by the land owner desiring the same.

Expenses of witnesses to be paid under the direction of the commissioners.

LXXIII. And be it enacted, that the commissioners or assistant commissioner, in any case where they or he may see fit, may order such expenses of witnesses, and of the production of any books, deeds, contracts, agreements, accounts, or writings, terriers, maps, plans, and surveys, or copies thereof, and all other expenses (except the salary or allowance to any commissioner or assistant commissioner) incurred in the settlement of any suit or difference, or in the hearing and determining any objection to any award or apportionment before the said commissioners or any assistant commissioner, to be paid by such parties interested in the production thereof respectively or in the event of such suit, difference, or objection, and in such proportions as the commissioners or assistant commissioner shall think fit and reasonable.

Expenses of making any award to be paid by the land owners and tithe owners as the commissioners may direct.

LXXIV. And be it enacted, *the allowances to and expences of land surveyors and tithe valuers necessary for making any award, and all other expenses of or incident to making the said award, except the salary or allowance to any commissioner or assistant commissioner, and except any expenses which the commissioners or any assistant commissioner, or any court or arbitrator, may be authorized to order and may have ordered to be otherwise paid, shall be borne and paid by the land owners and tithe owners interested in the said award, in such proportion, time, and manner as the commissioners or assistant commissioner shall direct.

* Sic.

Expenses of apportionment to be borne rateably by the land owners.

LXXV. And be it enacted, that all the expenses of or incident to making any apportionment (except the salary or allowance to any commissioner or assistant commissioner, and except any expence which the commissioners or assistant commissioner may be authorized and may have ordered to be otherwise paid), shall be borne and paid by the owners of lands included in the apportionment in rateable proportion to the sum charged on the said lands in lieu of tithes by such apportionment.

Expences may be recovered by warrant of distress.

LXXVI. And be it enacted, that if any difference shall arise touching the said expences, or the share thereof to be paid by any person, it shall be lawful for the commissioners or some assistant commissioner to certify under their or his hand the amount to be paid by such person; and in case any person shall neglect or refuse to pay his share so certified to be payable by him, and upon the production of such certificate before any two justices of the peace for the county or other jurisdiction wherein the lands mentioned in the agreement or award or apportionment are situate, such justices, upon the non-payment thereof, are hereby required, by warrant under

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their hands and seals, to cause the same and the costs of the distress to be levied by distress and sale of the goods of the person liable to pay the same, and to render the surplus (if any), after deducting the charges of the distress and sale, to the person distrained upon.

Owners of particular estates may charge the costs on the estate for twenty years.

LXXVII. And be it enacted, that every owner of an estate in land or tithes less in the whole than an immediate estate of fee simple or fee tail, or which shall be settled upon any uses or trusts, may, with the consent of the commissioners, and in such manner as they may direct, charge so much of the expences of commutation as is to be defrayed by him, or any part thereof, and the interest thereon after the rate of four pounds by the hundred, upon the lands whereof the tithes are commuted, or upon the rent-charge to be received by him instead of such tithes respectively, but so nevertheless that the charge upon such lands or rent-charge respectively shall be lessened in every year following such commutation by one twentieth part at least of the whole original charge thereon.

Costs of ecclesiastical tithe owners may be charged on the benefice for twenty years.

LXXVIII. And be it enacted, that every ecclesiastical beneficed person who shall commute the tithes of his benefice under this act may advance or borrow the sum necessary to defray so much of the expences of commutation as is to be defrayed by him, or any part thereof, and as a security for repayment may charge or assign the rent-charge to be received instead of such tithes for twenty years, or until the principal sum advanced or borrowed, and the interest thereon after the rate of four pounds by the hundred, and the expences of such charge or assignment, shall be sooner paid; and every incumbent successively shall pay the interest of the sum advanced or borrowed, or of so much thereof as shall then remain unpaid, as the same shall become due, or within one calendar month next following, and also an instalment at the rate of five pounds for every hundred pounds of the principal sum advanced or borrowed, and in default of such payment the ordinary may sequester the profits of the benefice until such payments shall be made, provided that the sum to be so advanced or borrowed shall be ascertained and certified under the hand of any commissioner or assistant commissioner, and shall be by him stated to have been the amount of such expences properly incurred by such ecclesiastical beneficed person in relation to such commutation.

If tenant of lands at rack rent dissent from paying the rent-charge, the landlord may

LXXIX. And be it enacted, that any tenant or occupier who at the time of such commutation shall occupy at rack rent any lands of which the tithes shall be so commuted may, within one calendar month next after the confirmation of the apportionment

by the commissioners, signify, by writing under his hand given to or left at the usual residence of his landlord or his agent, his dissent from being bound to pay any rent-charge apportioned and charged on the said lands as aforesaid, and in that case such landlord shall be entitled, from the time when the said apportionment shall take effect, and during the tenancy or occupation of such tenant or occupier, to stand, as to the perception and collection of tithes, or receipt of any composition instead thereof, in the place of the owner of the tithes so commuted, and to have all the powers and remedies for enforcing render and payment of such tithes or composition which the tithe owner would have had if the commutation had not taken place.

take the tithes during the tenancy.

LXXX. And be it enacted, that any tenant or occupier at the time of such commutation who shall have signified his dissent from being bound to pay any such rent-charge as aforesaid, or who shall hold his lands under a lease or agreement providing that the same shall be holden and enjoyed by him free of tithes, and every tenant or occupier who shall occupy any lands by any lease or agreement made subsequently to such commutation, and who shall pay any such rent-charge, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with the said landlord.

Tenant paying rent-charge to be allowed the same in account with his landlord.

LXXXI. And be it enacted, that in case the said rent-charge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days notice in writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years; provided that not more than two years arrears shall at any time be recoverable by distress.

When rent-charge is in arrear for twenty-one days after half-yearly days of payment, the person entitled thereto may distrain.

LXXXII. And be it enacted, that in case the said rent-charge shall be in arrear and unpaid for the space of forty days next after any half-yearly day of payment, and there shall be no sufficient distress on the premises liable to the payment thereof, it shall be lawful for any judge of His Majesty's courts of record at Westminster, upon affidavit of the facts, to order a writ to be issued directed to the sheriff of the county in which the lands chargeable

When rent-charges are in arrear for forty days after half-yearly days of payment, and no sufficient distress on the premises, writ to be issued di-

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with the rent-charge are situated, requiring the said sheriff to summon a jury to assess the arrears of rent-charge remaining unpaid, and to return the inquisition thereupon taken to some one of His Majesty's courts of law at Westminster, on a day therein to be named, either in term time or vacation; a copy of which writ, and notice of the time and place of executing the same, shall be given to the owner of the land, or left at his last known place of abode, or with his known agent, ten days previous to the execution thereof; and the sheriff is hereby required to execute such writ according to the exigency thereof; and the costs of such inquisition shall be taxed by the proper officer of the court; and thereupon the owner of the rent-charge may sue out a writ of habere facias possessionem, directed to the sheriff, commanding him to cause the owner of the rent-charge to have possession of the lands chargeable therewith until the arrears of rent-charge found to be due, and the said costs, and also the costs of such writ and of executing the same, and of cultivating and keeping possession of the lands, shall be fully satisfied: Provided always, that not more than two years arrears over and above the time of such possession shall be at any time recoverable.

Directing sheriff to summon jury to assess arrears.

Account how to be rendered.

LXXXIII. And be it enacted, that it shall be lawful for the court out of which such writ shall have issued, or any judge at chambers, to order the owner of the rent-charge who shall be in possession by virtue of such writ from time to time to render an account of the rents and produce of the lands and of the receipts and payments in respect of the same, and to pay over the surplus (if any) to the person for the time being entitled thereunto, after satisfaction of such arrears of rent-charge and all costs and expenses as aforesaid, and thereupon to order a writ of supersedeas to issue to the said writ of habere facias possessionem, and also by rule or order of such court or judge from time to time to give such summary relief to the parties as to the said court or judge shall seem fit.

For recovery of rent-charges from Quakers.

LXXXIV. Provided always, and be it enacted, that in all cases in which it shall be necessary to make any distress under this act in respect of any lands in the possession of any person of the persuasion of the people called Quakers, the same may be made upon the goods, chattels, or effects of such person, whether on the premises or elsewhere, but nevertheless to the same amount only and with the same consequences in all respects as if made on the premises; and that in all cases of distress under this act upon persons of that persuasion the goods, chattels, or effects which may be dis-

trained shall be sold without its being necessary to impound or keep the same: Provided always, that no writ under the provision hereinbefore contained shall be issued for assessing or recovering any rent-charge payable under this act in respect of any lands in the possession of any person of the persuasion aforesaid, unless the same shall be in arrear and unpaid for the space of forty days next after any half-yearly day of payment, without the person entitled thereto being able to find goods, chattels, or effects either on the premises or elsewhere liable to be distrained as aforesaid sufficient to satisfy the arrears to which such lands are liable, together with the reasonable costs of such distress.

Powers of distress and entry to extend to all lands within the parish occupied by the owner or under the same landlord or holding.

LXXXV. And be it enacted, that whenever any rent-charge payable under the provisions of this act shall be in arrear, notwithstanding any apportionment which may have been made of any such rent-charge, every part of the land situate in the parish in which such rent-charge shall so be in arrear, and which shall be occupied by the same person who shall be the occupier of the lands on which such rent-charge so in arrear shall have been charged, whether such land shall be occupied by the person occupying the same as the owner thereof, or as tenant thereof, holding under the same landlord under whom he occupies the land on which such rent-charge so in arrear shall have been charged, shall be liable to be distrained upon or entered upon as aforesaid for the purpose of satisfying any arrears of such rent-charge, whether chargeable on the lands on which such distress is taken or such entry made, or upon any other part of the lands so occupied or holden: Provided always, that no land shall be liable to be distrained or entered upon for the purpose of satisfying any such rent-charge charged upon lands which shall have been washed away by the sea, or otherwise destroyed by any natural casualty.

Powers of 4 & 5 W. 4, to extend to rent-charges under this act.

LXXXVI. And be it enacted, that the several provisions of an act passed in the fourth and fifth years of His present Majesty, intituled "An Act to amend an Act of the eleventh year of King George the Second, respecting the apportionment of rents, annuities, and other periodical payments," shall extend to all rent-charges payable under this act.

Provision for the sale of buildings and the sites thereof rendered useless or unnecessary by the

LXXXVII. And be it enacted, that if any barns or buildings belonging to any tithe owner having a limited estate or interest therein, which shall have been generally used for the housing of tithes paid in kind, shall be rendered in the whole or in part useless by reason of any commutation of tithes under this act, it shall be lawful for every such tithe owner (with the consent, nevertheless, of

commutation of tithes.

the commissioners, and subject to such directions as they may give, to be signified under their hands and seal,) to pull down any such barns or buildings or any part thereof, and to sell and dispose of the materials or to sell and dispose of all or any of such barns or buildings, and the site thereof, and either with or without any farm buildings or homesteads thereunto belonging, in such manner as the commissioners may direct; and upon payment of the consideration money it shall be lawful for every such tithe owner (with such consent as aforesaid) to convey and deliver the premises sold as aforesaid to the purchaser thereof, or to such uses and in such manner as such purchaser shall direct; and the consideration money in each case shall be paid to such tithe owner, and his receipt shall be a good discharge to the purchaser; and such tithe owner shall lay out and invest the consideration money in such manner and for such trusts as the commissioners shall direct for the benefit of the persons entitled to the said rent-charge.

Leases of tithes may be surrendered.

LXXXVIII. And be it enacted, that it shall be lawful for the lessee being in occupation of any tithes commuted under this act, by an instrument in writing under his hand and seal, to be made in such form as the commissioners shall direct, and confirmed under their seal, to surrender and make void the lease by which the said tithes are held or enjoyed by such lessee at the time of the commutation, so far as the same may relate to the said tithes; and it shall be lawful for the commissioners, by the same instrument, to direct what compensation (if any) shall be given by the immediate lessor of any lessee at rack rent so surrendering any lease of any such tithes to such lessee, and what allowance (if any) shall be made by any lessee to his immediate lessor of any such surrendered lease, in consideration of the non-fulfilment of any conditions contained in such lease, and what deduction (if any) shall be made from the rent thenceforth payable by any lessee to his immediate lessor in respect of other hereditaments which may have been included with the said tithes in any such lease: Provided always, that any intermediate lessor to whom any such lease shall have been surrendered shall as regards his immediate lessor be taken to be the lessee in occupation of the tithes included in the said lease.

Tithes due before commutation not to be affected.

LXXXIX. And be it enacted, that nothing in this act contained shall affect any right to any tithes which shall have become due before the commutation.

Act not to extend to Easter offerings, &c.

XC. And be it enacted, that nothing in this act contained, unless by special provision to be inserted in some parochial agreement and

specially approved by the commissioners, in which case the same shall be valid, shall extend to any Easter offerings, mortuaries, or surplice fees, or to the tithes of fish or of fishing, or to any personal tithes other than the tithes of mills, or any mineral tithes, or to any payment instead of tithes arising or growing due within the city of London, or to any permanent rent-charge or other rent or payment in lieu of tithes, calculated according to any rate or proportion in the pound on the rent or value of any houses or lands in any city or town under any custom or private act of parliament, or to any lands or tenements the tithes whereof shall have been already perpetually commuted or extinguished under any act of parliament heretofore made.

or to payments instead of tithes in London, or to permanent rent-charges by custom or act of parliament.

XCI. And be it enacted, that no advertisement inserted by direction of the commissioners or any assistant commissioner, or by any tithe owner or land owner, in the London Gazette, or in any newspaper, for the purpose of carrying into effect any provision of this act, and no agreement, award, or power of attorney made or confirmed or used under this act, shall be chargeable with any stamp duty.

Advertisements, contracts, and awards, not to be liable to stamp duty.

XCII. And be it enacted, that the said commissioners may receive and send by the general post from and to places in England and Wales all letters and packets relating exclusively to the execution of this act free from the duty of postage, provided that such letters and packets as shall be sent to the said commissioners be directed to the "Tithe Commissioners for England and Wales," at their office in London, and that all such letters and packets as shall be sent by the said commissioners shall be in covers, with the words "Tithe Commissioners for England and Wales" printed on the same, and be signed on the outside thereof under such words with the name of such person in his own handwriting as the said commissioners, with the consent of the lords commissioners of the treasury or any three or more of them, shall appoint, (such name to be from time to time sent to the secretary of the General Post Office in London,) and be sealed with the seal of the said commissioners, and under such other regulations as the said lords commissioners or any three or more of them shall think fit; and if the person so to be appointed shall subscribe or seal any letter or packet whatever, except such only concerning which he shall receive the special direction of his superior officer, or which he shall himself know to relate exclusively to the execution of this act, or if the person so to be appointed, or any other person, shall send or cause to be sent under any such cover any letter, paper, or writing, or any inclosure, other than shall

Correspondence of commissioners relating to this act to be free of postage.

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relate exclusively to the execution of this act, every person so offending shall forfeit and pay the sum of one hundred pounds and be dismissed from his office, one moiety of such penalty shall be paid to the use of His Majesty, his heirs and successors, and the other moiety to the use of the person who shall inform or sue for the same; and every such penalty may be sued for and recovered in any of His Majesty's courts of record in Westminster.

False evidence to be deemed perjury; withholding evidence a misdemeanor.

XCIII. And be it enacted, that if any person under the provisions of this act shall wilfully give false evidence he shall be deemed guilty of perjury; and if any person shall make or subscribe a false affidavit or declaration for the purposes of this act he shall suffer the penalties of perjury; and if any person shall wilfully refuse to attend in obedience to any lawful summons of any commissioner or assistant commissioner, or to give evidence, or shall wilfully alter, withhold, destroy, or refuse to produce any book, deed, contract, agreement, account, or writing, terrier, map, plan, or survey, or any copy of the same, which may be lawfully required to be produced before the said commissioners or assistant commissioner, he shall be deemed guilty of a misdemeanor.

Limitation of actions against commissioners, assistant commissioners, justices, &c.

XCIV. And be it enacted, that no action or suit shall be commenced against any commissioner, assistant commissioner, justice of the peace, valuer, umpire, or surveyor, for any thing done under the authority of this act, until twenty-one days notice thereof shall have been given in writing to the party against whom such action or suit is intended to be brought, or after sufficient satisfaction or tender of amends shall have been made to any party aggrieved, or after three calendar months shall have expired from the commission of the act for which such action or suit shall be so brought; and every such action shall be brought, laid, and tried in the county or place where the cause of action shall have arisen, and not in any other county or place; and if it shall appear that such notice of action or suit was brought before twenty-one days notice thereof given as aforesaid, or that sufficient amends were made or tendered as aforesaid, or if any such action or suit shall not be commenced within the time before limited in that behalf, or such action shall be laid in any county or place other than as aforesaid, then the jury shall find a verdict for the defendant therein, or the court, upon summary application by motion in any such suit, may dismiss the same against such defendant; and if a verdict shall be found for such defendant, or such suit shall be dismissed upon application as aforesaid, or if the plaintiff in such action or suit shall become non-

suit, or suffer a discontinuance of such action, or if upon any demurrer in such action or suit judgment shall be given for the defendant therein, then such defendant shall have costs, charges, and expences as between attorney and client.

Proceedings under this act not to be quashed for want of form, nor to be removed by certiorari.

XCV. And be it enacted, that no order, adjudication, or proceeding made or had by or before the commissioners or any assistant commissioner under the authority of this act, or any proceeding to be had touching any offender against this act, shall be quashed for want of form, or be removed or removeable by certiorari, or any other writ or process, into any of His Majesty's courts of record at Westminster or elsewhere.

Limits of act.

XCVI. And be it enacted, that this act shall extend only to England and Wales.

Act may be altered this session.

XCVII. And be it further enacted, that this act may be amended, altered, or repealed by any act or acts to be passed in this present session of parliament.

ANNOTATIONS.

I. For some useful annotations on this Act, see Mr. Bosanquet's recently published work, which, besides the explanatory notes, contains a practical plan for the voluntary commutation of tithes, together with all the forms settled by the commissioners. It is by far the best work on the subject that has hitherto appeared.

II. With reference to section 24, which enacts, that the decision of the arbitrator shall be final and conclusive on all parties, see Mr. Bosanquet's note, p. 79; and for form of a submission to arbitration, see p. 205, of the same work. It has already been shewn in Book I. Ch. III. s. 2, p. 221, that by the stat. 2 & 3 Will. 4, c. 80, ecclesiastical and collegiate bodies are enabled, in conjunction with their lessees, to enter into deeds of reference with the owners of adjoining lands, to settle the boundaries of tithes, &c.

III. In compliance with the 56th section, the comptroller of corn returns published in the London Gazette of Friday, 26th of August 1836, the following advertisement,—"Return stating what has been during seven years, ending on Thursday next before Christmas day, 1835, the average price of an imperial bushel of British wheat, barley, and oats, computed from the weekly averages of the corn returns published pursuant to an Act passed in the sixth and seventh years of the reign of his present Majesty, intituled "An Act for the commutation of tithes in England and Wales."

"*Wheat*, 7*s*. 1½*d*.—*Barley*, 3*s*. 11½*d*.—*Oats*, 2*s*. 9*d*."

With respect, however, to the average price of wheat an error occurred in the return, which, as appears from an advertisement in the Gazette of Friday, 9th December, 1836, ought to have been—Wheat, 7*s*. 0½*d*. only.

In further compliance with the Act, the comptroller of corn returns published also the following advertisement in the Gazette of Friday, 13th Janu-

ary 1837,—"Return stating what has been, during seven years, ending on the Thursday next before Christmas-day 1836, the average price of an imperial bushel of British wheat, barley, and oats, computed from the weekly average of the corn returns.

"*Wheat*, 6*s.* 8½*d.*—*Barley*, 3*s.* 11¾*d.*—*Oats*, 2*s.* 9*d.*"

IV. It may be useful to remark, that the sections numbered 56 & 57 ought to have immediately followed section 66. The mistake, though noticed in the debate, was discovered when it was too late to be rectified, at least conveniently.

BOOK II.

OF THE FORMAL PARTS OF ASSURANCES.

BOOK II.

OF THE FORMAL PARTS OF ASSURANCES.

INTRODUCTION.

Formal parts of deeds.

THE most usual and formal Assurances are deeds; hence the contents of the present book relate principally to the formal parts of deeds. Wills, agreements, and other instruments, are framed according to established forms; but those forms are for the most part much simpler, and less invariable than the forms of deeds. "It is not, indeed," says Blackstone (*a*), "absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity."

Punctuation of deeds.

The writing of a deed is without punctuation, and such stops and marks of parenthesis must be supplied

(*a*) Comm. ii. 298.

by the reader as will give effect to the whole (*a*). Marks of parenthesis are, indeed, usually inserted, but it seems that they are to be regarded, in the construction of the deed, only when they are consonant with the sense, and required by the context (*b*). The precedents in this and other collections are pointed by the printers, according to the usual practice; but no attention is to be paid to the punctuation.

Premises of deeds.

The premises of a deed are all the parts preceding the habendum, viz. the Introduction and (in indentures) the Date—the Parties, or (in deeds poll) the Names of the Grantors, Releasors, &c.—the Recitals —the Consideration—and, the Grant, Release, or other Operative part. Then follow the Habendum—the Declaration of uses or trusts—the Provisoes, and other explanatory clauses—the Covenants for title, and other covenants—and the form, commencing with the words, "In witness," which connects the contents with the signatures and seals, and in deeds poll contains the date. In appointments, deeds of covenant, and other deeds, which contain no habendum, the premises must be understood to be those parts of the deed preceding and including the operative part (*c*).

Commencement of deeds poll.

It is unnecessary, in this place, to give examples of the forms of Assurances, as the precedents in the subsequent volumes afford them; but it may be proper

(*a*) 4 T. R. 65, 66.
(*b*) 3 Atk. 9, 10; 1 Mer. 651.
(*c*) See 2 Bl. Com. 298; Burton's Law of Real Property, arts. 513—516; Shepp. Touchst. ch. v. p. 75, and infra, vol. iii. p. 200, n. (*o*).

to observe, that, when a deed poll is to contain recitals, the proper form of commencement is with the words, "To all to whom these presents shall come, A. B., of &c., sendeth greeting;" the operative part afterwards beginning, "Now these presents witness that;" but when a deed poll contains no recitals, it begins with the words, "Know all men by these presents, that I, A. B., of," &c.

Deeds poll, when employed.

Deeds poll are but little used in modern conveyancing, as the form of an indenture is, in most cases, more convenient; but for releases, by way of extinguishment of claim, for many declarations of trust, and for some other assurances of a simple nature, in which all that is to be done is by one party (whether consisting of one or more persons), the deed poll is the most convenient form. It is not very usual to employ a deed poll when covenants are to be entered into; but there is no question that a covenant entered into by a deed poll, with a covenantee named in the deed, is valid (*a*).

(*a*) *Greene* v. *Horne*, Salk. 197. See too further, infra, vol. v. p. 462, n. (*b*); *Salter* v. *Kidgly*, Carth. 76; *Berkeley* v. *Hardy*, 5 B. & C. 355.

CHAPTER I.

OF DATES.

Dates of deeds.

IN ancient times the dates of deeds were often omitted, because the limitation of prescription or time of legal memory was often changed, and a deed bearing date before that time was not pleadable. The dates were first commonly added in the reigns of Edward II. and Edward III., and have been always inserted since that time (*a*). It is not, however, essential, that a deed should be dated, for if it has no date, or an impossible date, or if the date be proved to be different from the time of delivery, the deed will take effect from the time of delivery (*b*). Yet where there is an express date, though false, and reference is made in any part of the deed to the date for the computation of any period of time, this will be referred to the express date, and not to the time of delivery (*c*). As a general rule, resulting

(*a*) Co. Litt. 6. a.

(*b*) Shepp. Touchst. 72; *Goddard's case*, 2 Rep. 4 b.; *Stone* v. *Bale*, 3 Lev. 348; *Hall* v. *Cazenove*, 4 East, 477; 3 Bac. Abr. 164; *Cooper* v. *Robinson*, 10 Mee. & Wels. 694. It is well settled that a deed has no operation but from the time of its execution. See the last case, and the cases there cited.

(*c*) Burton on Real Property, art. 526; *Doe* d. *Cox* v. *Day*, 10 East, 427; *Styles* v. *Wardle*, 4 B. & C. 908.

from the last, deeds take precedence of effect according to their times of delivery, except in counties where registers are established, where they take precedence according to their times of registration. If, indeed, a deed be delivered only as an escrow, *i. e.* only to take effect when some condition is performed, the delivery is not complete, and the deed is consequently of no force, till the condition is performed; but when the condition has been performed, the deed becomes good, and takes effect from its first delivery (*a*).

When two deeds bear the same date, and manifestly contain but one agreement, that deed shall be presumed to have been first executed which will best support the clear intention of the parties (*b*).

In indentures, the date is always placed at the beginning, in this form :—

"This Indenture, made the day of , 18 ." And the "In Witness" clause, at the end of the deed, contains a reference to it in the words, "the day and year first above written." In deeds poll the date is placed at the end in the "In Witness" clause; and in wills (*c*) the date is likewise placed at the end. In agreements, the date is generally placed at the beginning, as in an indenture (*d*), but occasionally at the end (*e*).

(*a*) Cru. Dig. by White, vol. iv. pp. 29, 30. See, too, *Spicer* v. *Burgess*, 1 C., M. & R. 129; *Exton* v. *Scott*, 6 Sim. 31; *Grugeon* v. *Gerrard*, 4 You. & Coll. 119.

(*b*) *Taylor* v. *Horde*, 1 Burr. 106; Yel. 138.

(*c*) See infra, vol. v. p. 19.

(*d*) See infra, vol. iii. p. 98.

(*e*) See infra, vol. iii. p. 38.

CHAPTER II.

OF PARTIES.

Parties to a deed—who should be;

ALL persons from whom anything is to pass by an instrument, or who are to enter into any engagement in respect to the subject matter, must obviously execute the instrument in the manner prescribed by law. And according to the forms of English instruments (*a*), they must be named in the commencement of the instrument, which, in the case of an indenture, is called making them parties to it; and the same expression is often, though not very correctly, applied to the persons named as the grantors or releasors in a deed poll. All persons, too, who are intended to take any *immediate* estate or benefit by an indenture, should be named as parties (*b*). This rule does not extend to remainders (*c*), nor, it has been said, to uses (*d*). A power of attorney may be given by indenture to a person not named as a party (*e*). A person not named as a party to an

(*a*) See infra, vol. iii. p. 3, n. (*a*).

(*b*) Co. Litt. 231. a.

(*c*) Co. Litt. 231. a., 259. b.

(*d*) 2 Prest. Conv. 394. It is observed, however, that the case there cited is not directly in point. Burton on Real Property, art. 442, n.

(*e*) Co. Litt. 52. b.; Cro. Eliz. 905; Noy, 49; 2 Sand. on Uses, 5, (5th edit.), by Sanders and Warner.

indenture cannot sue upon a covenant in the indenture (*a*); but a person not named as a party may (if he execute the indenture) enter into a covenant with one who is named (*b*).

—arrangement of.

The mode of classifying and distributing the persons who are made parties to an indenture, or other instrument, made between parties, cannot well be defined in words, but is easily learnt from practice. It depends chiefly, of course, on the nature of the instrument. Thus, in a conveyance by joint tenants, they would all be of one part, but in a deed of partition, of several parts. A husband and wife are always of one part, except in a deed of separation, where they are of separate parts. A wife is never made a party without her husband, except in deeds which relate to property settled to her separate use, and as to which she is treated as a feme sole; many practitioners, indeed, even then make the husband a party, but his concurrence is altogether useless. The only general rule that can be laid down with respect to the distribution of parties is, that every person having a separate estate or interest should be of a separate part; and that all persons having a joint estate or interest should be of the same part; and, as we have before observed, the estates and interests of persons may be separate in one light, and joint in another, so that the nature of the instrument will regulate the distribution of the parties. The order

(*a*) See infra, vol. v. p. 462, n. (*b*); 3 Mau. & Selw. 322.

(*b*) *Salter* v. *Kidgly*, Carth. 702.

76; *Berkeley* v. *Hardy*, 5 B. & C. 355; S. C. 8 Dowl. & Ry.

of the parties is discussed in a subsequent part of the work (*a*).

—description of.

The parties must be described by their proper Christian and surnames, with the addition of their place of residence, profession, or rank. It is not usual, however, to give the place of residence of a peer, as the title is a sufficient distinction. The place of residence of an unmarried woman, and sometimes of a man, whose father or mother is a party to the deed, and who resides at the same place, is usually omitted, and the relationship mentioned instead. A nobleman's son or daughter is generally described in the parties by the legal description of name and surname, with the addition of, "commonly called," &c., giving the title of courtesy; and afterwards the title of courtesy is used alone, throughout the deed. There can be no question, however, that the description in the parties, by the title of courtesy alone, is sufficient (*b*); and, of course, the omission of that title is immaterial. A corporation should be described by the name by which it was incorporated.

—strict accuracy not essential in.

Strict accuracy, however, in the names or description of the parties, though always to be aimed at, is not essential, if there be sufficient to identify them (*c*). Thus, if a person be known by a different Christian name, or by one or more only of the names with which he was baptized, the description by the name of reputation is sufficient (*d*). And even in the case

(*a*) See infra, vol. iii. p. 99, n. (*b*).

(*b*) Carth. 440.

(*c*) Co. Lit. 3; Touchst. 233, 236.

(*d*) Bracton, 188 b.; Com. Dig.

of a corporation, (which, it has been argued, has nothing but its name, and that, therefore, if it does not convey by that name, it does not convey at all), it is sufficient to use such a description as to identify the corporation (*a*). A wife is a good name of purchase without a Christian name; and, as in other cases, the addition of a wrong Christian name is immaterial (*b*). It is convenient, however, to add the surname of the wife in the parties, because, when mentioning her in the subsequent parts of the deed, distinct from her husband, it is shorter to use the surname than to describe her, each time, as the wife of her husband. A name by reputation is sufficient, as in the case of a bastard (*c*). If a man be baptized by one name, and confirmed by the bishop by another, the name of confirmation is the name to be used (*d*).

Fait, E. 3; 3 Bac. Abr. 378; 8 Taunt. 646; 7 Bing. 455; *Gould* v. *Barnes*, 3 Taunt. 504; *Williams* v. *Bryant*, 5 Mee. & Wels. 447.

(*a*) *Croydon Hospital* v. *Harley*, 6 Taunt. 467; *Fanshawe's case*, Moo. 255.

(*b*) Co. Litt. 3. a.

(*c*) Co. Litt. 3. b.; 2 Ro. Abr. 135, A.; 3 Mau. & Selw. 254.

(*d*) Co. Litt. 3. a.

CHAPTER III.

OF RECITALS.

Recitals—general object and principles of.

RECITALS are the narrative of the facts and instruments shewing the title to the subject-matter; the condition of the parties in relation to it; and the motive for the operative parts of the instrument. The general principles on which they should be framed are explained in the introduction to the Third Volume (*a*); and the rules applicable to several particular classes of recitals are stated in the notes to the precedents (*b*). So much on the subject of recitals has been anticipated in the notes referred to, that very few points remain to be adverted to.

—how far evidence.

A recital in any instrument is not evidence, except as against parties to the instrument, and those claiming under them (*c*); but as against such persons it is evidence (*d*), and generally conclusive evidence (*e*).

(*a*) Infra, vol. iii. pp. 4, 11, 15.

(*b*) See particularly, infra, vol. iii. p. 207, n. (*b*), p. 210, n. (*d*), p. 222, n. (*c*), p. 225, n. (*g*), and the general index to the notes, art. RECITALS.

(*c*) *Fort* v. *Clark*, 1 Russ. 601.

(*d*) *Fitzgerald* v. *Eustace*, Gilb. Ev. 100; *Marchioness of Annandale* v. *Harris*, 2 P. Wms. 432; *Burnett* v. *Lynch*, 5 B. & C. 589; *Doe* d. *Rogers* v. *Brooks*, 3 Ad. & Ell. 513; *Welcome* v. *Upton*, 6 Mee. & Wels. 536.

(*e*) See infra, vol. iii. p. 192, n. (*b*).

—restrain and qualify the operative parts.

As recitals are meant to indicate the intention of the parties, they will, when clearly expressed, be allowed to restrain or vary the effect of the operative parts of the deed (*a*). But a mis-recital, either of the substance or date of a former instrument, or of the estate of any party, will not invalidate a deed (*b*), although, as before observed, it may affect the construction.

Introductory recitals—when to be dispensed with.

Introductory recitals are sometimes, perhaps, unnecessarily used, from a wish to assimilate all instruments to the common form. Thus, there seems very little occasion, in an instrument exercising a power upon the mere desire of the appointor, to insert a recital of his desire; and in an agreement which is itself introductory, a recital stating the desire of the parties to enter into the agreement, will be most conveniently dispensed with.

(*a*) Infra, vol. iii. p. 15; vol. v. p. 473; Burton on Real Property, art. 530; see, however, *Ex parte Young*, 4 Dea. 185; *Ex parte Glyn*, 1 Mont. Dea. & De G. 29.

(*b*) *Withes* v. *Casson*, Hob. 128; *Lewen* v. *Moody*, 3 Leon. 135; Cro. Jac. 127; *Jerman* v. *Orchard*, Skinn. 528, 543; S. C. Show. P. C. 199.

CHAPTER IV.

OF WITNESSING PARTS AND CONSIDERATIONS.

Witnessing parts.

AFTER the recitals, or in instruments not containing recitals, immediately after the parties come the witnessing parts. These usually commence with a reference to the agreement or intention intended to be effectuated, and then proceed to state or refer to the consideration. It is not necessary, however, that the consideration should be stated in the usual place; it is sufficient if a consideration is mentioned anywhere in the deed, even although a *motive* which is not a consideration be stated in the usual place of the consideration (*a*).

Considerations.

Considerations are either "valuable," as money, or money's worth, marriage and the like, or "good," such as consanguinity, natural love and affection, and the like (*b*). It is usual and desirable to state the consideration with precision; but if there be no consideration, or none which admits of being stated, the expression "for divers good causes and considerations" is employed (*c*). The same expression, too, is usually added when the consideration ex-

(*a*) *Thomas* v. *Thomas*, 2 Gale & Dav. 226.

(*b*) 2 Blackst. Comm. 297;

see too infra, vol. iv. p. 587, n.

(*c*) See infra, vol. iv. p. 565, n.

pressly stated is only a good consideration (*a*). If the consideration be the obligations or relative situation of the parties, as developed in the recitals, the witnessing part is usually expressed to be made "in consideration of the premises." The mode of stating money and money's worth as a consideration, and the use and effect, as well of the receipt which in such cases is inserted in the deed, as of that which is indorsed, are explained elsewhere (*b*); the manner of stating other considerations needs no particular explanation, and will be learnt from the precedents. When the instrument contains more than one witnessing part, the whole consideration should generally be stated in the first (*c*). It was formerly usual to state the payment, in almost every deed of alienation, of a nominal consideration of ten shillings to any of the conveying parties to whom no pecuniary consideration was actually paid; but as the practice was absurd in all cases except those in which the deed, although not enrolled, might operate as a bargain and sale, it has not been followed in the present work. The reasons are explained in the notes to some of the precedents (*d*).

Effect of the want or failure of consideration.

The mere want of a consideration does not render a deed void (*e*), except in the cases in which convey-

(*a*) See infra, vol. iv. p. 565, n.

(*b*) Vol. iii. p. 194, notes (*f*) and (*g*); see, too, the recent case of *Lynn* v. *Chaters*, 2 Keen, 521.

(*c*) See infra, vol. iii. p. 259, n. (*e*), p. 655, n. (*e*).

(*d*) Vol. iii. p. 196, n. (*i*), p. 579, n. (*c*).

(*e*) 4 East, 200; 2 B. & Ald. 554; see, however, the observations of Lord Chief Justice Denman, 2 Gale & Dav. 165.

ances have been made void by statute against the creditors of, and purchasers from, the grantor (*a*). And if the consideration be something future or contingent, and afterwards fail, the deed is not thereby avoided (*b*); and in the case of a settlement made in consideration, or upon the supposition of the validity of a marriage, which turned out to be invalid, it was held that the settlement remained good (*c*).

Inadequate consideration when relieved against in equity.

A court of equity will relieve against an inadequate consideration, not only in the case of contracts, but even after the execution of the conveyance; but in the latter case, the inadequacy must be very gross to obtain relief (*d*). In the case, however, of heirs and others selling expectancies and reversions, the court requires that an adequate price, according to the market value (even if not according to an actuary's valuation), shall have been given, and for default of it will set aside a purchase (*e*). Hence, in dealing with an estate which has been sold as a reversion, it is desirable to know that an adequate price was paid for the reversion.

(*a*) See infra, vol. iv. p. 587, n. (*a*).

(*b*) Co. Litt. 204. a.

(*c*) *Boughton* v. *Sandilands*, 3 Taunt. 342.

(*d*) 1 Sugd. Vend. & Purch. 10th edit. ch. ii. ss. 1—22; *Borell* v. *Dann*, 2 Hare, 440, 450.

(*e*) Sugd. ss. 22—57.

CHAPTER V.

OF OPERATIVE WORDS.

Operative words—place and form of.

AFTER the statement of the consideration, and the receipt for it, come the operative words. In all instruments of alienation it has been usual to insert these words twice, first in the past, and then in the present tense (*a*), and that practice has been adhered to throughout the earlier part of this work; but on the passing of the act dispensing with a lease for a year, opportunity was taken of the change of form, which then became necessary in releases, to do away with the reduplication of the operative words in all instruments, and in the latter part of the work they are used in the present tense only (*b*). Several remarks on the operative words of different kinds of deeds will be found in the subsequent volumes (*c*), but some points still remain to be noticed.

The word "grant" not

It has become a tolerably settled practice, that

(*a*) See the reason assigned, infra, vol. iii. p. 195, n. (*h*).

(*b*) Infra, vol. v. p. 267, n.

(*c*) On the usual operative words of conveyance, and on operative words generally, see vol. iii. p. 196, n. (*i*); on the operative words of surrender, see vol. iii. p. 261, n. (*f*); of release, vol. iii. p. 318, n. (*l*); of assignment, vol. iii. p. 335, n. (*c*); in mortgages, vol. iii. p. 466, n. (*f*); in leases, vol. iv. p. 28, n. (*b*); in exchanges, vol. iv. p. 269, n. (*e*); in deeds of disclaimer, vol. v. p. 609, n. (*b*).

used by mortgagees, trustees, &c.

mortgagees and other incumbrancers, and trustees, and other persons not having a beneficial interest, do not convey by the word "grant;" at least, not unless the word is preceded by "according to their respective estates and interests, but not further or otherwise," or some similar expression. This practice arises from a notion that the word "grant," when used without qualification, implies a warranty of the title, but there is no foundation for such a doctrine. It has been conclusively shewn, that the word "grant," when used in the conveyance of an estate of inheritance, or of the whole of the grantor's estate, does not imply a warranty, and that, even if it did, the insertion of the express covenant against their own incumbrances only, which is always entered into by persons not beneficially interested, or interested only as incumbrancers, would restrain the implied warranty within the import and effect of the covenant (*a*). In leases for years, rendering rent, and containing no express covenant by the lessor for quiet enjoyment by the lessee, the grant will be taken to imply a general covenant for quiet enjoyment during the term; but if a person, having only a term of years, conveys the lands as an estate in fee simple by the word "grant," that does not amount to a warranty during the term (*b*). Although, however, there is no objection to an incumbrancer or trustee

Reason for the practice that "grant" implies a warranty insufficient.

The word "grant" not essential in any conveyance.

(*a*) Hargr. & Butl. Co. Litt. 384. a., n. (1).

(*b*) Hargr. & Butl. Co. Litt. 384. a., n. (1). See, too, infra, vol. iv. p. 40; and the recent cases of *Hinde* v. *Gray*, 1 Mann. & Gran. 195; *Granger* v. *Collins*, 6 Mee. & Wels. 458.

conveying by the word "grant" without qualification, yet it is not worth while to disturb the settled practice; for it is certain that in conveyances by lease and release, or by release in pursuance of the act dispensing with a lease for a year, the whole estate of the conveying party, as well in things lying in livery as in things lying in grant, will pass by the word "release." The contrary has, indeed, been supposed, from some observations in Bridgman's Complete Conveyancer (*a*); but it has been shewn that the objection could apply only to the case of a feoffment, and there can be no question that even in that case the word "release" would pass anything lying in grant, and on which, consequently, the livery would not operate. For it has never been held necessary that the word "grant" should be used in a grant, it being sufficient if the intention to grant be manifested. In some early cases, indeed, the word "grant" was held to be essential (*b*), and the doctrine has been so stated by an eminent modern writer, but the contrary is now well established law (*c*).

The word "grant" may operate as any species of assurance, and any species of assurance as a grant.

The word "grant" in a conveyance is of the most general extent and effect, and may operate as a grant, feoffment, gift, lease, release, confirmation, surrender, covenant to stand seised, or other assurance (*d*); but a release, confirmation, surrender, or the like, it was

(*a*) Vol. i. p. 323.

(*b*) Moo. 34, pl. 113; *Denton* and *Fettiplace's case*, cited 1 Cro. Jac. 213.

(*c*) Hargr. & Butl. Co. Litt. 384. a., n. (1); 5 T. R. 129; see too the cases of deeds operating as grants, collected infra.

(*d*) Co. Litt. 301. b.; 2 Saund. Rep. by Williams, 96 a, n. (1).

formerly said, could not operate as a grant, nor one of such assurances as another, because they are proper and peculiar manner of conveyances, and destined to a special end (*a*). But "the judges of late years have had a greater consideration for the *passing* of the estate, which is the *substance* of the deed, than the *manner* how, which is the *shadow*," (3 Lev. 372); and it seems now to be settled, that if a deed is incapable of operating as intended, but is capable of operating as some other kind of assurance, it shall be held so to operate. Thus, a feoffment of lands in lease, if void for want of livery of seisin, may operate as a grant of the reversion (*b*); so, likewise, a bargain and sale not enrolled (*c*), and an appointment not executed in the manner required by the power (*d*). A grant and surrender has been construed as a covenant to stand seised (*e*). And where a conveyance was by bargain and sale enrolled, in order to make a tenant to the præcipe, but if it were construed as a bargain and sale the recovery would have been void, by reason of the legal estate not being vested in the tenant, it was held to operate as a grant, so as to make the recovery valid (*f*).

Practical use of this doctrine.

The doctrine that releases, and other deeds, if inoperative in their own character, may, if circumstances

(*a*) Co. Litt. 301. b.

(*b*) 2 Roll. Abr. 56, pl. 1; *Knotsford* v. *Edes*, Id. pl. 2; *Lucy* v. *Englefield*, Id. pl. 3.

(*c*) *Adams* v. *Steed*, Cro. Jac. 210.

(*d*) *Shove* v. *Pincke*, 5 T. R. 124, 310.

(*e*) *Doe* d. *Daniel* v. *Woodroffe*, 10 Mee. & Wels. 608.

(*f*) *Haggerston* v. *Banbury*, 5 Bar. & Cress. 101; S. C. 7 Dowl. & Ry. 723; see, too, *Goodtitle* v. *Bailey*, Cowp. 600.

permit, operate as grants, is very useful in practice. For it often happens, that in conveyances by lease and release, the lease for a year is lost, or is defective; but if the estate was in lease, or there was a term of years outstanding, the release will have operated as a grant of the reversion. It is true that, after a considerable lapse of time, the execution of a lease for a year, which is not forthcoming, will be presumed (*a*), and an attempt has been made to remedy such defects by the late statute, 4 & 5 Vict. c. 21 (*b*); but, it is apprehended, that in many cases the doctrine adverted to will still be found useful.

Operation of conveyance by tenant for life and remainder-man.

In conveying a reversion, a grant is the proper assurance; but in practice the conveyance is by lease and release, or a release grounded on the statute, in order to avoid the difficulty of preserving evidence of the subsistence of the particular estate at the date of the conveyance. If a tenant for life and reversioner or remainder-man join in conveying the inheritance, each of course passes his own estate (*c*); and although the proper mode of conveyance in such cases is by a release referring to the statute, yet, if the conveyance contained no such reference, it would, it seems, be construed as operating, first as a grant of the reversion or remainder, and then as a surrender of the estate for life (*d*).

(*a*) Infra, vol. iii. p. 51, n. (*i*); see, too, *Jenkins* v. *Peace*, 6 Mee. & Wels. 725; *Ford* v. *Lord Grey*, 6 Mod. 44; 1 Salk. 285.

(*b*) Infra, vol. v. p. 266, n. (*f*).

(*c*) 1 Co. Rep. 76 a, 6—14 b.

(*d*) 2 Roll. Abr. 498 k, pl. 2.

Operative words of powers.

In appointments made in exercise of powers, the operative words to be used are those mentioned in the power, and no others; for, although the same liberality of construction is given to appointments as to other instruments, and any words sufficiently indicating the intention are held to operate as an exercise of a power (*a*), yet the reasonable and only safe course is, to use the exact form which the power authorizes.

(*a*) 1 Sugd. Pow. (6th edit.) ch. vi. sect. 2.

CHAPTER VI.

OF PARCELS.

THE operative words are followed immediately by the description of the property conveyed or dealt with. This description is technically called the "parcels." The word "parcel" (in law Latin, "*parcella*,") seems to have been originally applied in the sense of "a piece" to land only, (Jacob's Law Dict. *Parcel*); but in modern usage, the expression "parcels" is used to signify the description of the property, be it what it may. The leading rules and principles as to the position and frame of the parcels are stated and explained in the notes to some of the precedents (*a*). Generally, the parcels are copied from the latest description in the abstract of title, with such trifling variations only as the change of tenancy or condition may require; but if there have been no new description given for a considerable time, it usually becomes necessary to frame a new description from an actual survey, or such other materials as may come to hand. In that case the point is (with a view to preserving evidence of identity) to connect the new with the old description by a suitable reference.

Parcels—meaning of.

—how framed.

(*a*) See particularly infra, n. (*g*); p. 552, n. (*a*); p. 354, vol. iii. p. 209, n. (*c*); p. 212, n. (*g*); and see the index to the n. (*f*); p. 240, n. (*f*); p. 312, notes under the head "PARCELS."

If the instrument containing the old description be recited, and the recital (as it should do) refer to the new description in the operative part, the object is accomplished; but if such be not the case, the way is, in the operative part, to set out the old description, and follow it by the modern description introduced by the words—"All which said hereditaments are now better known and described as follows, (that is to say);" or to set out the modern description, and follow it by the ancient, introduced by the words—"All which said hereditaments were formerly known and described as follows, (that is to say)." In giving the ancient description, however, it must be carefully seen that no deeds or other instruments are referred to, as the obvious result of such a reference would be to encumber the title with the deeds or instruments in question, since the modern deed could never be produced without giving notice of the old deeds. It is also desirable (especially in dealing with large estates) to add such general description or reference as will include all the property embraced in the old description, even if it should turn out to be wanting in the new, and (what is generally more important) to include all the property embraced in the modern description, although not in the old.

Meaning of particular words of description.

It would be of no practical utility to enter into an explanation of the various technical words of description of real property which are mentioned in text books (*a*). It will, however, be convenient to ob-

(*a*) All the information on the subject may be found in Co. Litt. p. 21 et seq.; Burton on the 4. a., 6. a.; Sheppard's Touchst.

serve, that by the word "manor" all the demesne lands of the manor and the freehold of the copyhold lands will pass as well as the seignory (*a*); and an advowson appendant to the manor will pass by a conveyance of the manor (*b*), except when the conveyance is by the crown (*c*). A reputed manor too will pass by the description of a "manor" (*d*). The word "messuage" is used to express an ordinary dwelling-house, but seems properly to mean a dwelling-house with land attached (*e*). The expression "capital messuage" is applied, not in the auctioneer's meaning of an excellent house, but as the chief mansion-house (*capitale*, from *caput*,) of the estate. The word "farm" includes the farm-house and all the land held therewith (*g*). "Land" signifies, not only land in the ordinary meaning of the word, but houses and everything therein, or permanently affixed thereto (*h*). The word "tenement" comprises, not only land, but every subject of tenure, whether corporeal or incorporeal (*i*). But "hereditament" is the word of largest signification and of most uni-

Law of Real Property, arts. 545—553; Cru. Dig. tit. xxxii. ch. xxi. s. 34 et seq. See, too, Jacob's Law Dictionary.

(*a*) Co. Litt. 5. a.; Shepp. Touchst. 92.

(*b*) Shepp. Touchst. 92.

(*c*) *Attorney-General* v. *Sitwell*, 1 You. & Coll. 559.

(*d*) Cru. Dig. tit. xxxii. ch. xxi. sect. 38.

(*e*) Co. Litt. 5. b.; *Smith* v. *Martin*, 2 Saund. 500; Burton on Real Property, art. 546. See, too, *Fenn* v. *Grafton*, 2 Bing. N. C. 617.

(*g*) Co. Litt. 5. a.; Shepp. Touchst. 93.

(*h*) Co. Litt. 4. a.; Touchst. 91.

(*i*) Co. Litt. 6. a.

versal use; it extends to everything which may be inherited, whether corporeal or incorporeal, real or personal, or mixed (*a*). "Water" will not extend to the land on which it stands (*b*): the proper description of a piece of water is "that piece of land covered with water:" the word "pool," however, includes not only the water but the land on which it stands (*c*).

Qualifications: The general description of the property may be restrained by qualifications, either implied or express.

—implied. A striking instance of implied qualification is the rule that, if general words be preceded by a specification or enumeration of particulars, the general words will not be construed to signify any thing of a higher order, or more importance than what is before expressed (*d*); thus, by the description of all the grantor's "plate, jewels, and other estate," only property of the same kind, as plate and jewels, or, at the utmost, only personal estate, will pass (*e*).

—express. An express qualification is the addition of something which narrows the general description. Thus, in a grant of the "manor of D. *in D.*," the words "in D." are an express qualification, restraining the general description of the manor to that part of it

(*a*) Co. Litt. 6. a.; 2 Blackst. 17. It is said in the Touchst. 91, that the word "tenements" is a word of as large extent as "hereditaments;" but this is contrary to the other authorities.

(*b*) Co. Litt. 4. b.

(*c*) Co. Litt. 5. b.

(*d*) Burton on Real Property, art. 557.

(*e*) Id. art. 558; Jarm. on Wills, ch. xxiii.; infra, vol. v. p. 95, n. (*g*), p. 114, n. (*b*); *Foyer* v. *Ranken*, 11 Sim. 65; *Wrench* v. *Jutting*, 3 Beav. 521.

which lies in the vill of D. (*a*); and if a man grant all his lands in D. *which* he purchased of A. B., nothing will pass but the lands which he purchased of A. B. (*b*). It is, however, a most important practical rule, that if there be a sufficient description to render certain the property intended, the addition of an erroneous circumstance as to the occupation or locality, or otherwise, will have no effect (*c*). Thus, if a person grant a close, *by name*, as situate in a certain parish and county, and it turns out that the parish lies in two counties, and that the whole of the close in question is situate in the county not named, the false addition will have no effect (*d*). And if a man grant a farm by name, and then describe it (contrary to the fact) as in the occupation of a certain person, this false circumstance will be considered as mere surplusage (*e*). But if there be an error in the principal description, a correct addition, it is said, will not remedy the error. Thus, a grant of lands in the parish of A., in the tenure of B., will not pass lands of the grantor which are situate in C., and held by B., although the grantor have no lands in A. (*g*).

Effect of erroneous additions to a description.

The parcels in the case of real estate are followed by the general words embracing the rights, easements, and other appurtenances belonging to the property (*h*); and by the clauses called the estate

General words.

(*a*) Touchst. 99.
(*b*) Bro. Abr. *Grants*, 92.
(*c*) Burton on Real Property, arts. 560—567.
(*d*) 4 Cru. Dig. by White, p. 269.
(*e*) Id.
(*g*) Id. p. 270.
(*h*) See infra, vol. iii. p. 199, n. (*m*), p. 200, n. (*n*), p. 213,

and reversion clauses (*a*): but it has become a common practice to omit the reversion clause, and that practice has accordingly been adopted in the latter volumes of these precedents.

Exceptions.

The most convenient place for the insertion of any exceptions which are intended to be made out of the property granted is after the estate clause, because all ambiguity as to what is granted and what is excepted is, by that arrangement, avoided. The law relating to exceptions is discussed in a subsequent volume (*b*).

n. (*h*); vol. iv. p. 217, n. (*h*). See, too, on the subject of the claim by prescription, the late cases of *The Monmouthshire Canal Company* v. *Harford*, 1 C., M. & R. 631; S. C. 5 Tyrwh. 85; *Onley* v. *Gardiner*, 4 Mee. & Wels. 496; *Clayton* v. *Corby*, 2 Gale & Dav. 174: and on the subject generally, see *Onley* v. *Gardiner*, ubi supra; *Hinchcliffe* v. *The Earl of Kinnoul*, 5 Bing. N. C. 1. As to the extinction of a right of way by an inclosure act, see *Adeane* v. *Mortlock*, 5 Bing. N. C. 236.

(*a*) See infra, vol. iii. p. 200.

(*b*) See infra, vol. iv. p. 44, n. (*a*). See, too, further, 4 Cru. Dig. by White, p. 271 et seq. The privilege of sporting is not, it seems, either an exception or a reservation; *Wickham* v. *Hawker*, 7 Mee. & Wels. 63.

CHAPTER VII.

OF HABENDUMS.

THE Habendum immediately follows the parcels, and has for its office to define the precise nature of the estate granted (*a*). Deeds which operate merely by declaration of use, as an appointment under a power, or covenant to stand seised, or a simple declaration of uses, do not contain an habendum, because the appointment, covenant, or declaration itself, fulfils the office of the habendum, by limiting the estate to be created. So, in well-drawn wills, limiting estates in settlement, instead of devising the estates to trustees with an habendum to those trustees, and a declaration of uses, it is more usual and convenient to devise at once to the intended uses. Generally speaking, no person can take an *immediate* estate in the habendum of the deed, unless he is

Habendum—the place and office of.

—what estates may be limited by.

(*a*) 4 Cru. Dig. by White, p. 272; *Strickland* v. *Maxwell*, 2 Cro. & Mee. 539; *Burton* v. *Barclay*, 7 Bing. 745. The form of the habendum is explained infra, vol. iii. p. 200, n. (*o*). The introductory words of the habendum (from which it takes its name) are, in conveyances of lands, "to have and to hold;" but in grants of annuities, assignments of monies, and the like, the expression "to have, hold, receive, and take," or some similar expression, is generally used.

named in the premises (*a*); but if no person be named in the premises, then a person first named in the habendum may take (*b*); and if a person be named in the premises by an evident mistake, his name may be rejected in construction (*c*). A person not named in the premises may take an estate in remainder by the habendum; and it is said, that where several persons are to take successively, by way of remainder at common law, it is most correct to name only the first taker as grantee in the premises (*d*). In declarations of uses, a use may, of course, be limited in the habendum to a person to whom no estate is granted in the premises (*e*); and generally, it should be observed, that in the modern construction of instruments, the meaning deduced from the general tenor of the instrument will be preferred to that which would result from a strict attention to the proper objects of the several technical parts (*g*). Nothing can be added by the habendum to what has been granted by the premises: thus, a grant of Blackacre, habendum together with Whiteacre, is void as to the latter (*h*). But a mere variation of name in the habendum is of no importance: thus, if the nomination of an advowson be granted, habendum the advowson,

—cannot add to the premises.

(*a*) *Brookes* v. *Brookes*, 2 Roll. Abr. 67; 4 Cru. Dig. by White, 272.

(*b*) Touchst. 75; Co. Litt. 7. a., n. 3, 26. b., n. (4).

(*c*) *Spyve* v. *Topham*, 3 East, 115.

(*d*) Burton on Real Property, art. 518.

(*e*) *Sammes' case*, 13 Rep. 55.

(*g*) *Spyve* v. *Topham*, ubi supra; *Strickland* v. *Maxwell*, 2 Cro. & Mee. 539.

(*h*) 2 Roll. Abr. 65; Touchst. 76.

the deed is good, for the nomination of an advowson and the advowson are the same thing (*a*). If the habendum be void (as if it defer the vesting of the first estate of freehold to a future day), and no estate be limited in the premises, the deed is void, because the estate for life implied by the premises will not hold against the express estate of the habendum; but where an express estate is limited by the premises, there, if the habendum be void, the estate limited by the premises shall take effect (*b*). If an express estate be limited in the premises, and an estate is created by the habendum in abridgment of, inconsistent with, or repugnant to, the estate limited in the premises, in such case the premises shall be good, and the habendum void: thus, if an estate be conveyed to a man and his heirs habendum to him for life, an estate in fee is created by the premises, and the habendum is void (*c*). It is, however, to be observed, that where any act beyond the delivery of the deed is requisite to the perfection of the estate limited by the premises, and such further act is not requisite to the perfection of the estate limited by the habendum, then the estate of the habendum will alone take effect; for that estate is perfected by the deed, and is not to be destroyed by the subsequent act. Thus, if a feoffment be made to a man and his heirs, habendum

Effect of the premises if the habendum be void.

Habendum void if inconsistent with the premises;

—except where some ulterior act must be done to perfect the estate limited by the premises.

(*a*) Plowd. 157.

(*b*) 2 Sanders on Uses, by Sanders & Warner, (5th edit.), 154, n. (*o*); *Goodtitle* v. *Gibbs*, 5 B. & C. 709.

(*c*) 2 Sanders on Uses, Ib. As to the effect of the habendum of an underlease in abridging the effect of the "all the estate" clause, see, infra, vol. iii. p. 542, n. (*e*).

to him for a term of years, the estate for years will be good, and that in fee, void, because the livery of seisin necessary to perfect the latter will, in the ordinary course, be subsequent to the delivery of the deed which perfects the former estate. Of course, however, it would be different if the livery of seisin preceded the delivery of the deed. Another instance is that of a bargain and sale which is perfected by inrolment (*a*). Where, however, the same further act is required to perfect the estate limited in the premises, and that created by the habendum, then the habendum cannot abridge the estate limited by the premises, but may enlarge it (*b*). And although the habendum cannot, under such circumstances, abridge the estate limited by the premises, yet it may qualify such estate. Thus, if an estate be given to a man and his heirs, habendum to him and the heirs of his body, he will take only an estate tail, because the habendum may qualify the word heirs to mean heirs of the body (*c*). So, if lands be given to a man and his heirs, habendum to him and his heirs for three lives, the habendum restrains the fee simple estate of the premises to an estate for three lives (*d*). If a lease

Habendum may enlarge or qualify the estate granted by the premises.

(*a*) 2 Sand. on Uses, (5th edit.), 155; *Baldwin's case*, 2 Co. Rep. 23; *Earl of Derby* v. *Taylor*, 1 East, 502.

(*b*) 2 Sand. on Uses, (5th edit.), 156; Co. Lit. 299. a.

(*c*) 4 Cru. Dig. 274. If, however, an estate be granted to a man and the heirs of his body, habendum to him and his heirs, he will take an estate tail with a fee-simple expectant. 8 Co. Rep. 154 b; Co. Litt. 21. a.; *Turnman* v. *Cooper*, Cro. Jac. 476; Perkins, sect. 170.

(*d*) *Pilworth* v. *Pyett*, 5 Jones, 4.

be made to two persons, habendum one moiety to one, and the other moiety to the other, the joint estate limited by the premises is converted by the habendum into an estate in common (*a*). If, however, by the premises, twenty acres be granted to two persons, habendum ten acres to the one, and ten acres to the other, the habendum is void, for it makes an express division of the acres, which is inconsistent with the undivided possession limited by the premises (*b*). If a lease be made to two, habendum to the one for life, remainder to the other for life, this habendum is good (*c*). But where an estate was granted to A., habendum to him, B. and C. "pro termino vitæ eorum et alterius eorum successive diutius viventium," the habendum was void; for B. and C. could not take as lessees in possession, because they were not named in the premises, nor could they take jointly by way of remainder, because the limitation was to them "successive;" and they could not take in succession, because it did not appear who should take first (*d*).

Further information on the subject of habendums will be found in the common text-books (*e*), and in the authorities cited in the foregoing notes.

(*a*) Co. Litt. 183. b., 190. b.; 1 P. Wms. 19.

(*b*) Id.

(*c*) 2 Sand. on Uses, 5th edit. 158, n.; Co. Litt. 183. b.

(*d*) *Windsmore* v. *Hobart*, Hob. 313; 2 Sand. on Uses, 5th edit. 158, n.

(*e*) Shepp. Touchst. pp. 75, 77; 2 Sand. on Uses, 5th edit. p. 154, n.; 4 Cru. Dig. by White, p. 272, et seq.; Burton on Real Property, arts. 515, 521.

CHAPTER VIII.

OF COVENANTS.

Covenants—definition of.

A COVENANT is the agreement of two or more by *deed*, whereby one of the persons doth promise to the other that something is or is not done already, or shall, or shall not, be done afterwards (*a*). In other words, a covenant is an agreement by deed. It may be by deed-poll as well as by indenture, provided that the covenantee be named in the deed (*b*); but of course it will affect him only if he accept the deed. In modern practice, covenants are usually inserted only in deeds between parties, *i. e.* indentures, but occasionally (as in a release in extinguishment of claim, when an indemnity is required) they are inserted in deeds-poll. It must be observed, however, that covenants in an indenture entered into with persons who are not parties confer no right of action on such persons (*c*). It is not necessary that a person should execute the deed; if he accepts the deed in other respects, he will be bound by the covenants (*d*).

(*a*) Touchst. p. 160.
(*b*) Infra, vol. v. p. 462, n. (*b*).
(*c*) Id.; see, also, *Salter* v. *Kidgley*, Carth. 76; *Berkeley* v. *Hardy*, 5 B. & C. 355.
(*d*) Co. Litt. 231. a.

No particular words are required to constitute a covenant; any words in a deed which indicate an agreement are sufficient. Thus, where a lease was made to a man, *upon condition* that he should acquit the lessor of ordinary and extraordinary charges, and should keep and leave the houses at the end of the term in as good plight as he found them; it was held, that these words created a covenant (*a*). The most appropriate technical word of covenant is "covenant" itself, to which others are added, according to the fancy of the draftsman. Thus, "covenant, promise, and agree," "covenant and declare," "covenant, grant, and agree," and other combinations of the same and similar words, are usually found in deeds; but throughout the present collection, the word "covenant" alone is used, when a covenant and nothing but a covenant is intended. There can be no question that the other words are altogether superfluous. See further, *infra*, Vol. iii. p. 201, n. (*p*). —appropriate words of.

Covenants are either express or implied. Express covenants are those which are actually expressed in words; implied covenants are those which are not expressed in words, but are implied by law from other words. The most common examples of implied covenants are the covenant for quiet enjoyment by a lessee, implied from the words of demise (*b*), and the —are either express or implied.

(*a*) Bro. Abr. Cov. pl. 4. See further, 4 Cru. Dig. by White, pp. 368, 369.

(*b*) Infra, vol. iv. p. 40. n. (*k*). See, too, the late cases of *Granger* v. *Collins*, 6 Mee. & Wels. 458; *Hinde* v. *Gray*, 1 Mann. & Grang. 195. This implied covenant, however, determines with the estate of the les-

covenant for payment of rent by a lessee, implied from the reddendum of a lease (*a*). Covenants are never implied, except when express covenants on the same points are altogether wanting: it is usually said, that an express covenant qualifies and restrains the generality of an implied covenant, but it seems more correct to say, that the law implies a covenant in certain matters, when there is no express covenant on such matters, because it considers that there must necessarily have been some agreement thereon; but if there be any express covenant, that shews there was an agreement, and also what it was, and removes all ground for implying any further agreement (*b*).

—and real or personal.

Covenants are also divided into real and personal. Covenants real are those which have for their object land or other real property, or something annexed to or connected therewith, and which run with the land, so that he which hath the land hath the benefit, or is subject to the burden of the covenants (*c*). Covenants personal are those which do not run with the land, but of which the benefit or the burden goes with

sor; as, where a tenant for life demised for a term, without expressly covenanting for quiet enjoyment, and died before the end of the term, and the tenant was thereupon evicted by the remainder-man: it was held, that the tenant could not maintain an action against the executor of the tenant for life, upon the implied covenant for quiet enjoyment. *Adams* v. *Gibney*, 6 Bing. 656.

(*a*) Infra, vol. iv. p. 30, n. (*e*).

(*b*) 4 Cru. Dig. by White, 370; *Line* v. *Stephenson*, 5 Bing. N. C. 183.

(*c*) Touchst. p. 161; 4 Cru. Dig. by White, p. 371.

some particular person (*a*). Thus, a covenant to levy a fine of land (*b*), or a covenant by tenants in common, that the survivor shall convey to the heir of such as die first (*c*), is a covenant real; but a covenant by a man to pay another a sum of money, or to serve him, is a personal covenant. The important and essential distinction between real and personal covenants is, that the burden or benefit (as the case may be) of the former runs with the land, and extends to the heir or purchaser, and to all others who claim the land through such covenantor or covenantee, while the burden or benefit of a personal covenant extends only to the covenantor or covenantee himself, and his personal representatives (*d*). The leading case on the subject of covenants running with the land is *Spencer's case* (*e*). It was there resolved, that when the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words, (*i.e.* by the use of the word "assigns"); but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being; and the rule is illustrated by the case of a covenant to repair a house actually de-

Distinction between real and personal covenants.

(*a*) Touchst. p. 161; 4 Cru. Dig. by White, p. 371.
(*b*) Touchst. 161.
(*c*) 6 Jenk. 241.
(*d*) 4 Cru. Dig. by White, 372.
(*e*) 5 Co. Rep. 16.

mised, which is a real covenant, and that of a covenant to build a house after the demise, which is a personal covenant. The latter covenant would, however, (according to the second resolution in the same case), be a real covenant, and run with the land if the assigns had been expressly named in the covenant, that is, if the lessee had covenanted for himself and his assigns. As the assignees of the estate of a lessee or grantee are bound by all covenants which run with the land, so are they entitled to the benefit of all such covenants as are entered into by the grantors or lessors (*a*). But, in either case, the assignee must be assignee of the whole estate, and not an undertenant (*b*); and the fact of the assignee becoming liable to a covenant does not remove or affect the liability of the original covenantee (*c*). The benefit of covenants real entered into by lessees or assignees at common law went to the heirs of the lessor or grantor (*d*); but no assignee or grantee of a reversion could take advantage of a covenant of this kind (*e*). By the statute 32 Hen. 8, c. 34, however, it was enacted, "that grantees and assignees of reversions, and their representatives, might take advantage of all covenants and conditions contained in the grant or lease,

(*a*) *Spencer's case*, 5 Co. Rep. 16; 4 Cru. Dig. by White, 272.

(*b*) *Holford* v. *Hatch*, 1 Doug. 183; *Earl of Derby* v. *Taylor*, 1 East, 502. Hence the practice of making mortgages of leaseholds by demise; see infra, vol. iii. p. 537.

(*c*) *Barnard* v. *Godscall*, Cro. Jac. 309; 1 T. R. 92, 95.

(*d*) *Lougher* v. *Williams*, 2 Lev. 92.

(*e*) 4 Cru. Dig. by White, 375.

in the same manner as the original grantors or lessors;" and by the same statute it was also enacted, "that lessees and grantees, their executors, administrators, and assigns, should have the same remedies against the grantees of reversions as they might have had against the original lessors or grantors." The points which had then been decided upon this statute are methodically stated by Sir Edward Coke (*a*); and the more recent decisions are mentioned in the notes on the statute in Evans's Collection of Statutes. See too, further, *infra*, Vol. iii. p. 74, n., p. 83, n. (*b*).

Covenants, joint and several.

If there are two or more covenantors, or two or more covenantees, the covenant may either be joint or several, or both joint and several. Thus, if there be two covenantors, they may bind themselves jointly, or may bind themselves severally, or may bind themselves both jointly and severally (*c*). And if there be two or more covenantees, the covenant may be entered into with them jointly, or with them severally, or in both ways (*d*). When, however, a covenant is entered into with two or more, and with each of them, it will not be considered joint *and* several, unless distinctly expressed as such by the deed itself,

(*a*) 1 Co. Litt. 215.

(*b*) It may be convenient to refer to a recent case, which has decided that the assignee of a reversion is not entitled, under the stat. 32 Hen. 8, c. 34, to an arrear of rent which has accrued prior to the assignment. *Flight* v. *Bentley*, 7 Sim. 149.

(*c*) See examples, infra, vol. iii. pp. 297, 529.

(*d*) See examples, infra, vol. iii. p. 484, vol. v. pp. 370, 550.

but will be deemed joint *or* several according as the interest of the covenantees in the subject-matter is joint or several (*a*). So, though the covenant be in form joint, yet, if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several; and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint (*b*). But where two persons covenant jointly and severally with another, the covenantee may bring an action against one of the covenantors only, though their interest in the subject-matter of the covenant be joint (*c*).

From the ambiguous manner in which covenants are often worded, questions frequently arise on the words themselves, whether a covenant was intended to be joint or several or both (*d*); and also whether

(*a*) *Slingsby's case*, 5 Co. Rep. 18; *Eccleston* v. *Clipsham*, 1 Saund. Rep. by Williams, 153; *Anderson* v. *Martindale*, 1 East, 497; *Servante* v. *James*, 10 B. & C. 410. Hence, when the covenant is intended to be joint and several, the expression should be, "with the said [*covenantees, &c.*] their heirs and assigns, and also as a separate covenant with each of them, his heirs, and assigns."

(*b*) *Windham's case*, 5 Rep. 8 a; Dyer, 337 b; *Wotton* v. *Cooke*, 2 Mod. 82; *Wilkinson* v. *Lloyd*, 3 Mod. 263; *Tippet* v. *Hawkey*, Bull. Ni. Pri. 157; *James* v. *Emery*, 8 Taunt. 245, S. C., in error, 5 Price, 529; 2 J. B. Moore, 195; *Owston* v. *Ogle*, 13 East, 538; *Withers* v. *Bircham*, 3 B. & C. 254; *Lane* v. *Drinkwater*, 1 C. M. & R. 599.

(*c*) *Enys* v. *Donnithorne*, 2 Burr. 1190; *Lilley* v. *Hedges*, 1 Stra. 553, S. C., 8 Mod. 166. As to the form of the action, *i. e.* whether debt or covenant, see *Harrison* v. *Matthews*, 10 Mee. & Wels. 768.

(*d*) See the cases referred to in the preceding notes, and the

the whole of a line of covenants are intended to be of the same class (*a*). Of course it is the business of the draftsman so to frame his covenants as to give no room for such questions; but it must be admitted, that, to accomplish this object, is not in all cases an easy matter. Some observations on the subject of the covenants to be entered into with and by tenants in common will be found, *infra*, Vol. iii. pp. 297, 345, 346; and, as to covenants by joint tenants, *infra*, Vol. iii. p. 297. The manner in which covenants as to the acts of several persons should be worded is indicated, *infra*, Vol. iii. p. 202, n. (*s*). As to the cases in which lessees should covenant jointly and severally, see *infra*, Vol. iv. p. 125, n. (*c*).

Covenants for title.

The questions relating to covenants for title are of great importance to the conveyancer; but as they are fully discussed in Sir Edward Sugden's work on the Law of Vendors and Purchasers (*b*), which is in the hands of every conveyancer, it is superfluous to enter into them in the present work. The covenants for title in settlements—at least in settlements made in consideration of marriage, or for other valuable consideration—are the same as in purchase-deeds. But the covenants in mortages are absolute, that is, are not limited to the acts of the mortgagor and the ancestors or testators (if any) through whom he

cases referred to in the note on *Eccleston* v. *Clipsham*, 1 Saund. Rep. by Williams, 154. See, too, *Lee* v. *Nixon*, 1 Ad. & Ell. 201.

(*a*) *The Duke of Northumberland* v. *Errington*, 5 T. R. 522; *Anderson* v. *Martindale*, 1 East, 497.

(*b*) Ch. xiii. s. 3, and ch. xiv. vol. ii. 10th edit.

claims, but extend to the acts of all persons whomsoever. The covenant for quiet enjoyment is, of course, only for quiet enjoyment after default in payment of the mortgage money (*a*). With reference to the point discussed, *infra*, Vol. iii. p. 32, n. (*k*), whether an agreement to convey implies an obligation to enter into the usual covenants for title, it should be observed, that the rule has not been laid down in the note referred to with sufficient strength. For it has been expressly said by Lord Eldon, that the contract for sale carries with it the right to proper covenants, and that the law will determine what these covenants are (*b*). The ancient cases on the subject may, therefore, be considered as overruled.

Covenants in leases.

The question, what are usual covenants in leases, is treated of, *infra*, Vol. iv. p. 14 et seq. (*c*). It may, however, be convenient to observe, that, in a recent case (*d*), where persons having only an equitable interest agreed to grant a lease which was to contain special covenants both on the part of the lessor and lessee, and the intended lessors died before the lease had been granted, and their interest became vested in bankrupt assignees, and an heir at law, against whom a decree for specific performance was made, it was held, that the assignees and heir were themselves bound, to the extent of their interest in the

(*a*) See, infra, vol. iii. p. 471, n. (*l*), p. 473, n. (*m*).

(*b*) *Church* v. *Brown*, 15 Ves. 263.

(*c*) See, too, as to a mining lease, *Blakesley* v. *Whieldon*, 1 Hare, 176.

(*d*) *Page* v. *Broom*, 3 Beav. 36.

property, to enter into the special covenants which the intended lessors had contracted to enter into. The principle of the decision is obviously not confined to leases.

Reference to authorities on the law of covenants.

It has not been attempted, in the few preceding remarks, to give even a complete outline of the law relating to covenants; the only object has been, to present to the reader a few of the most important points of the subject. It is one of the greatest practical difficulty and embarrassment in all cases except those which are of such constant recurrence, that the nature and form of the proper covenants have been well settled by practice. These cases have been noticed in their proper places in the notes to this work, and ample information on the general subject will be found in the works referred to in this chapter (*a*). One of the best compendiums of the law relating to covenants is that presented by the Real Property Commissioners, in their Third Report, and as it is short and not accessible in a separate form, it has been added as an appendix to the present book (*b*).

(*a*) See particularly, Shepp. Touchst., ch. vii.; 2 Sugd. Vend. & Purch. 10th edit. ch. xiii. s. 3, and ch. xiv. 4 Cru. Dig. by White, tit. xxxii. ch. xxvi; (*b*) See Appendix.

APPENDIX.

COVENANTS.

The title to real property often affected by covenants.

THE title to real property, and to various enjoyments connected with it, depends to a considerable extent upon covenants.

Covenants defined.

Covenants are engagements in a certain form entered into by one party to another; they are of course more or less permanent, in proportion to the estates or interests to which they relate.

Covenants real or personal, how distinguished.

Covenants are said to be real or personal. Some writers (and amongst them C. B. Comyns) (*a*) treat those as covenants real, of which (as they consider) a specific performance could have been enforced at the common law by a real action on the writ of covenant.

If this doctrine be correct, the specific performance of contracts as to real property (being under seal) was not unknown to the common law; but we have not been able to find any instance of actual recovery in such an action, and we are inclined to doubt whether the freehold or seisin ever was recovered. Perhaps the proposition may have been too hastily inferred from the case of a fine, which is the compromise of such an action, and does not prove that the land could have been specifically recovered if the suit had gone on to judgment. If there were any such real action known to the law, it will be abolished if the recommendation contained in our first report be adopted *.

Warranties distinct from covenants.

Warranties have been sometimes called covenants real (*b*), but the action was entirely distinct. They have now fallen into disuse, and we have recommended their abolition in our report, recommending the abolition of real actions †.

(*a*) Dig. Tit. Cov. A. 2, cites F. N. B. 145. A. 146; Reeves' Hist. of Com. Law, vol. 2, p. 263.

(*b*) Hal. Anal. 86.

(*) This has been done by the act 3 & 4 Will. 4, c. 27, s. 36.

(†) See the act 3 & 4 Will. 4, c. 27, s. 39; and 3 & 4 Will. 4, c. 74, s. 14.

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Leases also distinct.

Leases have also been termed covenants real. At common law a lease or demise was not considered as an alienation, but merely as an agreement that the lessee should have the land demised for the specified term. It was, however, an interest capable of being specifically maintained at law in the action of ejectment, in which from an early period the execution has been by writ of *habere facias possessionem* (*a*). It would at this day be a mere conceit to treat warranties and leases as covenants.

Upon the whole we are inclined to agree with the greater number of writers, who consider the distinction between real and personal covenants to depend not upon the nature of the remedy, but upon the fact of their relating or not relating to land.

All covenants personal as to the remedy.

All covenants, as they are now used, are, as to the remedy, *personal*. The breach of them gives a right to a personal action, and is to be compensated at law by damages. Of many of them equity will enforce a specific performance, but with reference to that relief, they are to be regarded merely as agreements binding in conscience without any reference to their peculiar characteristics as covenants.

Covenant can only be by deed;

is a specialty;

and, in some cases, runs with particular land.

In general a covenant can only be constituted by a deed under seal; it is an obligation of the nature of a specialty, being always binding upon the covenantor, his executors and administrators, (that is, on his personal estate), and upon his real estate in the hands of his heir or devisee when the heirs are named; it is also binding in particular cases on other parties claiming property to which it relates from or through the covenantor, that is, on his assigns; and the benefit of it, when it relates to real property, may also, in particular cases, be transmitted from the covenantee to his assigns of that property.

This part of the law proposed to be examined and amended.

This whole branch of the law of covenants we now propose to examine. It is of course of great importance that the party who is really interested in the subject-matter of the covenant should be the party entitled to the remedy for breach of it; and on the other hand, that when it relates to specific property, such remedy should be had against the party having the means of performing it; in other words, that the covenant should, in technical language, *run with the land*, both as against those who stand in the place of the covenantor, and in favour of those who stand in the place of

(*a*) F. N. B. 342; Hale's note says this was ruled in 24 Ed. 3.

the covenantee. As to both, the law is at present defective, or imperfectly settled.

In what respect the subject is difficult.

So far as the interest to be derived under a covenant is imperfectly transmissible, we have no great difficulty in suggesting the means of improving or settling the law; but there is considerable difficulty in determining the extent to which the assigns of the covenantor can be charged with the obligation.

The law proposed to be examined. 1. As respects covenants between parties in the relation of lessee and reversioner.

We propose to examine the law, 1st, As it respects covenants between parties in the relation of landlord and tenant, or lessee and reversioner; and, 2dly, As it respects covenants relating to land, or the title to land, when such relation does not exist.

Rules established by ancient authorities.

The authorities (*a*) lay down, 1st, That, in order to make a covenant run strictly with the land, so as to bind the assignee, or give him the benefit without his being named, it must relate directly to the land, or to "a thing in existence, parcel of the demise;" 2dly, That where it respects a thing not in existence at the time, but which when it comes into existence will be annexed to the land, the covenant may be made to bind the assigns by naming them, but will not bind them unless named; and, 3dly, That when it respects a thing not annexed, nor to be annexed, to the land, or a thing collateral, or in its nature merely personal, the covenant will not run, that is, it will not bind the assignee, nor pass to him, even though he is named.

These rules appear to have been originally laid down with reference to leases, but authorities are not wanting, in which they have been treated as applying equally to cases not involving the relation of landlord and tenant. They are usually laid down as constituting the whole of the settled law on this subject, and appear to apply equally, whether we consider the *burthen*, or whether we consider the *benefit* of covenants.

First, As to covenants in cases where the relation of lessee and reversioner subsists between the parties.

We must divide these into,—

1. Covenants entered into by the lessee.
2. Covenants entered into by the lessor.

And again we must, in considering each of these branches,

(*a*) Year Book, 42 Ed. 3, 3; Co. Litt. 384; *Spencer's case*, 5 Co. Rep. 17.

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distinguish between, 1, the burthen, and, 2, the benefit of the covenants.

As to the Burthen of Covenants entered into by the Lessee.

Most of a lessee's covenants run with the land.

Most of the covenants entered into by lessees fall within the two former of the above rules. Covenants to pay rent, to keep existing buildings and fences in repair, or to observe particular modes of cultivation, are all covenants of the first class; they run with the land, and bind the assignee, whether named or not. Covenants to erect buildings on the demised lands, to plant trees, &c., are, in well-drawn leases, made binding in like manner, by the assigns being named in them (*a*).

Instances of such as do not.

In many cases, however, covenants of the third class are entered into by lessees; as, for instance, covenants to haul coals to the lessor's house, or grind corn at his mill (*b*), to buy or sell stock on a farm at a valuation, &c. &c., and in these the assignee cannot be bound even though named.

The existing distinctions are artificial. Proposal, that they be abolished, and the burthen of all lessee's covenants made to bind assignees.

It appears to us that these distinctions are little else than *artificial*. They lead to subtleties, and in our opinion may be usefully abolished; and with reference to leases, and the covenants entered into by the lessees, we think it should be enacted, that all such covenants, of whatever nature and for whatever purpose, unless an intention to the contrary be expressed, or is to be inferred from the instrument, should be binding on every assignee of the term.

Reasons for this.

There would be no injustice in such an enactment, because it must always be in the power of the person who takes the assignment of a lease previously to ascertain its contents.

It is the practice to make every successive assignee where his predecessor is liable to the covenants in the lease, bind himself to

(*a*) A covenant to keep buildings situated within the bills of mortality insured against fire, has, by a rather forced construction, been held to be a covenant running with the land, because the statute 14 G. 3, c. 78, enables the landlord, by application to the directors of the insurance office, to have the sum insured laid out in reinstating the premises; and therefore it was held that the covenant, by the aid of the statute, amounted to an undertaking to rebuild or repair existing buildings, and so fell within the first resolution in *Spencer's case*. *Vernon* v. *Smith*, 5 B. & A. 1.

(*b*) This has been lately considered a covenant relating to the land, so long as the mill and the reversion remained the property of the lessor. *Vyvyan* v. *Arthur*, 1 B. & C. 410.

perform all such covenants; but this practice, although it has the effect of making every one in his turn liable, is open to the objection of doing this, not only by a circuitous and inconvenient mode, but by a mode which frequently fails.

It is obviously just as respects the landlord, that every one, who takes the benefit of the lease, should be bound to him for the performance of the terms on which it is granted.

As to the benefit of Covenants entered into by the Lessee.

In what cases the benefit of lessee's covenants goes to the assignee of the reversion.

It has been observed by an eminent living judge (*a*) that "an action [of covenant], at the suit of the assignee of the reversion, is maintainable in some cases at common law, in others, under the statute 32 Hen. 8, c. 34;" and from other observations which fell from the bench in the same case, it may be inferred that such covenants as were of a nature to run strictly with the land according to the distinctions already adverted to, were those to the benefit of which the assignee was entitled at the common law; this would reduce the operation of the statute to covenants of the second of the three classes above mentioned. It has not been held to extend to such as are merely collateral. There is some ambiguity in the language of the statute, which renders it difficult to determine what was the exact length to which it was then deemed necessary for the legislature to interfere, and to which the enactment was intended to extend, and accordingly the construction of it has been a subject frequently discussed.

Who is assignee of the reversion.

In a modern case (*b*) lands were by a will limited to *A.* for life with the usual power to grant leases, with remainders over; *A.* made a lease under the power, in which the lessee covenanted with *A.*, his heirs and assigns, for payment of the rent, and to keep the premises in repair; *A.* died, after which the remainder-man under the settlement brought an action of covenant, and it was held that the plaintiff could maintain such action as assignee of the reversion.

The reasoning on which the court in that case proceeded was, that the lease, being created under the power, took effect as if it had been created by the will, and consequently the testator might be considered as the lessor, and the remainder-man, claiming a

(*a*) *Bayley*, J., in *Vyvyan* v. *Arthur*, 1 B. & C. 414.

(*b*) *Isherwood* v. *Oldknow*, 3 M. & S. 382.

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portion of his estate, as an assignee within the statute. It was agreed that he was not assignee of the tenant for life, the hand which executed the lease; but it was considered that he was an assignee of the estate, out of which the lease proceeded.

An early authority (*a*), relied on in the case now under discussion, had settled, that in a similar case the remainder-man could maintain an action of debt upon the *reddendum* clause, and that he could have done so if the rent had been reserved yearly during the term, leaving the law to make the distribution without an express reservation to any person (*which the court said was the most clear and sure way*). As it is also clear that an implied covenant arises upon the *reddendum*, this last authority may be thought to have established that an action of covenant *for rent* was maintainable by the remainder-man, so that the decision in *Isherwood* v. *Oldknow* may be considered as an authority applicable to other express covenants.

We think therefore it may be laid down that, either at common law or under the statute, an assignee of the reversion is entitled to the benefit of all covenants entered into by a lessee with the lessor, his heirs and assigns, provided such assignee be owner of the reversion immediately expectant on the term, and provided the estate he has be the same estate, or derived out of the same estate, which, or a portion of which, the lessor had at the time of granting the lease.

As every lease, speaking practically, is granted to take effect out of the estate of the lessor or by virtue of a power, the owner of the reversion has in every case a remedy for the breach of every covenant, capable in its nature of running with the land.

Proposal to abolish the existing distinctions in this case also.

But we think that in like manner as the burthen of every covenant entered into by the lessee without distinction ought to be binding on his assignees, the benefit of it ought to be transmissible to the assigns of the reversion, and we therefore propose that in this case, as in the former, the existing distinctions shall be abolished.

As to the Burthen of Covenants entered into by the Lessor.

In what cases the burthen of a lessor's covenant runs.

The only express covenant entered into by lessors which can be considered universal is the covenant for quiet enjoyment, and this is a covenant entered into rather for the protection of the cove-

(*a*) *Whitlock's case*, 8 Rep. 70.

nantor, and to restrict the implied covenant which would arise out of the mere words of demise, than for the benefit of the lessee. Occasionally, however, there are covenants importing a more extensive obligation; but very seldom any others than such as relate to the land demised; and in those cases the burthen seems, under the law, as it now exists, to run with the reversion, and to bind the grantee or assignee.

with the reversion.

But with reference to covenants not relating to the land, it appears to us that they ought, as a general rule, to be made to run so far as to bind the assignee or grantee of the reversion to the extent of the value of the reversion. Such covenants may be reasonably considered as part of the consideration for the rent; and it is a sound maxim that he who takes the benefit ought also to bear the burthen. The lessee or his assignee is entitled to have them performed, and of course ought to have the best means of enforcing the performance of them against those who claim from him the benefit, for which the covenants were the consideration.

Proposed alteration.

There would, however, be an objection to make such covenants bind beyond the value of the reversion, because it is obvious that devisees and others frequently become seised of the reversion, without having the means at the same time of knowing the obligations imposed by the lease. In such cases, all that justice can require is, that the reversioner should be bound to the value of the reversion. Besides, to declare him bound beyond that would be to impose on him a greater degree of liability than is imposed by the common law on the heir of the covenantor, and by the statutes 3 & 4 W. & M. c. 14, and 1 Will. 4. c. 47, on his devisees, for both those classes of representatives are bound only to the extent of the assets they may derive from the ancestor or testator, and of course the reversion must be the only assets which the assignee of it, as such, will derive from the covenantor.

We propose, therefore, that every covenant in a lease (whatever its subject-matter may be) entered into on the part of the lessor, which, in the event of his death, would be binding on his heir and devisee, under the statutes of W. & M. and Will. 4, shall, unless an intention to the contrary be expressed, or necessarily inferred from the instrument, be binding on all persons, claiming as grantees or assignees of the reversion, either at common law or by virtue of the statute of 32 Hen. 8. c. 24, in the same manner and to the same extent only as the heir and devisee would be bound.

That every covenant shall bind the assignee of the reversion to the extent of the value of it.

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Reasons for this.

We think no fair objection can arise to an enactment to this extent. There is always that species of connection between the landlord and tenant which must exclude the danger of surprise or want of notice. The lessor preserves, or ought to preserve, a counterpart of the lease, which may be delivered to every successive grantee of the reversion; and where this precaution has not been used, the purchaser of an estate subject to a lease, having notice of the fact, is enabled to require that the nature and extent of the covenants which it may contain on the part of the lessor should be shewn.

The remedy will in most cases be in equity.

In most cases where the reversion shall have become divided amongst different persons, effectual remedy can only be obtained against such persons by suit in equity. It may be proper expressly to give such remedy, and to provide that, as between the grantor or lessor, and those who take the reversion under him, the latter should be primarily liable, in the absence of any declaration to the contrary.

As to the benefit of Covenants entered into on the part of the Lessor.

Proposal, that the benefit of lessors' covenants shall run with the land.

It seems to result from what we have already proposed with respect to the burthen of covenants entered into by lessees, that the benefit of all covenants entered into on the part of lessors, where an intention to the contrary does not appear, should run with the land, so as to entitle the assignee to maintain an action for the breach of them.

Proposal, that remedies for rent, and on covenants, shall not be lost by merger of the immediate reversion.

It sometimes happens, where the immediate reversion on a lease is a term, or other particular estate, that it becomes merged in some other estate in the same land; and where that is the case, not only the benefit of the covenants, but the rent, and all remedies for it, are lost. We think the law in this respect should be altered, and that it ought to be enacted, that where a merger of the immediate reversion takes place, it should have the effect of transferring the rent and covenants, and all remedies, to the person in whose estate the reversion merges.

Covenants and conditions against assigning or underletting, &c. without consent.

Leases often contain a covenant on the part of the lessee that he will not assign or that he will not underlet the premises without the consent of the lessor.

This, like all other covenants, is usually accompanied by a condition for re-entry on breach of it; and most of the cases in which

the peculiar circumstances we are about to notice have been discussed, have been cases of questions arising on the condition. It will be convenient to consider the whole subject together. It is probable that at some remote period the interest of a lessee was considered personal to himself, but as such interests came to be of value, they were soon considered of the nature of personal estate. The period at which they became assignable is remote, for cases on the liability of *assigns* under covenants are to be found early in the Year Books. When this important step was gained on the part of lessees, it was to be expected that lessors would seek to protect themselves, by inserting stipulations such as we are now adverting to. But the jealousy which always prevailed in our law against allowing restraints to be imposed on alienation, led to the discouragement of this kind of restriction, and it was accordingly decided (*a*), that when, under a condition restraining assignment without license, a license had been once given, the condition was determined; and the law is the same with respect to a covenant to the like effect, although there seems to be no reason why such a covenant or condition should not be held to run with the land, and be binding from time to time on such persons as might become assigns of the lease, with the consent of the landlord, according to the view taken by that eminent Judge Sir W. Grant in a modern case (*b*).

The law now is, that by license once given, the condition or covenant is gone for ever.

Upon whatever principle the doctrine of Dumpore's case was founded, it became the settled law; and although great Judges have disapproved of it (*c*), no one has ventured to overrule it, and it has been productive of much inconvenience and expense, and not a little litigation.

In Ireland, by the statute 7 Geo. 4, c. 29, (commonly called the Sub-letting Act), the law in this respect is altered; and it is enacted by section 1, that where lands are let by lease or instrument containing a condition or covenant, prohibiting assignment or sub-letting, no act of the lessor shall amount to a waiver of the benefit of such condition or covenant, but that such lessor, &c. shall be entitled to recover the land under the condition or damages for the breach of covenant, unless it be proved that the particular assignment or sub-letting was with his express consent; and by

Altered in Ireland by the Sub-letting Act.

(*a*) *Dumpore's case*, 4 Co. Rep. 119 b.

(*b*) *Weatherall* v. *Geering*, 12 Ves. jun. 511.

(*c*) See *Brummell* v. *Macpherson*, 14 Ves. 173.

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section 4 it is enacted, that an actual waiver by the landlord in one particular instance shall not be deemed to be a general waiver, or to extend to any other breach of covenant than that to which the waiver shall expressly relate (*a*).

Inconvenience of the rule of law.

There can be no doubt that in the majority of the cases in which this covenant is inserted in leases, the operation of the rule of law is a surprise on both parties to the contract. They suppose that the restriction will be binding upon the tenant for the time being, and that the landlord's consenting to a change of the person who is to fill the tenancy will not alter the terms upon which the tenancy was created. It is also contrary to the interest of both parties; as to the landlord, this is obvious; and as to the lessee, it is his interest that the restriction should continue, because, as his liability for payment of the rent and performance of the covenants will, notwithstanding his assignment, last throughout the term, it is a security to him against the consequences of that liability that the landlord should retain the power of preventing the indiscriminate assignment of the demised property. Again, the practical operation of the rule is, to occasion great inconvenience to him, for the landlord cannot be advised to grant a license to assign; he may indeed accept a surrender of the lease, and grant a new lease to the proposed assignee, but by so doing he loses his remedies against the original lessee. It has been considered that the object may be attained by the indirect process of creating a new covenant and condition against assignment; but this process, if effectual, is neither convenient nor generally well understood in practice. In some cases the landlord refuses his consent, in others he imposes onerous terms; and the lessee who has contracted to assign without a view to these difficulties is exposed to the risk of being obliged either to relinquish his contract, or to submit to concessions in order to obtain its completion.

To what covenants it applies.

It has not, so far as we are aware, been decided that this doctrine applies to any other covenant or condition than that against alienation (*b*), but it would seem to be equally applicable on principle to covenants and conditions, restrictive of carrying on particular trades, or converting lands from pasture to arable, and to all

(*a*) An alteration of this act, we believe, is now under consideration.

(*b*) See however this subject adverted to by Lord *Eldon*, in *Macker* v. *The Foundling Hospital*, 1 V. & B. 191.

covenants and conditions by which the license or consent of the lessor is made requisite for doing any particular act.

Proposal to alter the law by enacting that license or consent shall only authorize the particular act consented to.

It appears to us that the law may be very properly amended in this particular by an enactment, that in every case where, by the terms of a covenant or condition contained in a lease, the lessee shall be restricted from assigning the term, or underletting the premises, carrying on any trade, or altering the tillage, use, or management of the demised premises, or doing any other act, without the license or consent of the lessor, and where such license or consent shall have been once given to authorize an assignment, or any other act falling within the restriction, the covenant or condition, and all provisoes or agreements consequent upon it, shall not be considered to be thereby wholly released or dispensed with, but shall be deemed (except in that particular instance, and to the extent of that particular license or consent,) to be continuing obligations in the same manner as any other covenant, proviso, or agreement contained in the lease.

These covenants not to restrain assignments by assignees of bankrupts, &c.

It is held that covenants and conditions in restraint of assignment are not binding on assignees in bankruptcy, or under the Acts for the relief of Insolvent Debtors, or in cases of sale by the sheriff under writs; but whether the effect of this doctrine is to discharge the covenant or condition altogether, or whether it continues binding on purchasers from such assignees or from the sheriff, is a point which has been little discussed. The argument in all these cases has been the same, namely, that the assignment is made in the discharge of a duty imposed by the law.

It may be urged that a landlord should not lose a benefit which he has carefully stipulated for, on account of an alteration in the circumstances of his tenant. But then it is to be remembered that the landlord may protect himself by additional stipulation, and it may with reason be thought that the protection of creditors who have trusted their debtor, in reliance on his apparent property, ought to be a paramount consideration, and more especially as the insolvency of the debtor may have been occasioned wholly or in part by expenditure in improving the leasehold property, and as there is no room to suppose, that the landlord would in general be injured by an assignment to a person paying a valuable consideration, and taking the lease subject to all the covenants contained in it.

After much consideration, therefore, we propose that it should

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be declared that sales by assignees in bankruptcy or under the Insolvent Debtors' Act, or by the sheriff under process of execution, are not breaches of covenants and conditions not to assign, but that purchasers taking assignments from assignees, sheriff, executors, or administrators, should become liable to such covenants and conditions as well as to all others in the lease.

But purchasers from them to be bound.

As to covenants when the relation of lessee and reversioner does not subsist.

We proceed to consider covenants relating to land, in cases where the relation of landlord and tenant, or lessee and reversioner, does not exist. The law with respect to these cannot be so easily put on a right footing, as with respect to those which we have hitherto considered. We think these may be classed as follows:

1. Covenants made *with* the owner of the land to which they relate.

2. Covenants made *by* the owner of the land to which they relate.

3. Covenants relating to the custody and production of deeds, and muniments of title, where different parties are interested in them, which class of covenants is in some respects different, and appears to be open to a different sort of remedy, from all others.

Covenants for title.

1. The most ordinary instance of the first branch of covenants is found in the usual covenants for title; other instances of the same sort are special covenants to indemnify against existing charges which affect the land, to get in outstanding estates, or to procure further assurance.

In considering the *burthen* of these covenants, no difficulty can arise, for they are in their nature general obligations binding on the covenantor and his real and personal representatives, but cannot be binding on any particular parties as assignees. We have therefore only to consider in this place the *benefit* of such covenants.

Covenants for title have in modern practice supplied the place of warranties, from which they principally differ in this, that the remedy for defect of title under a warranty was the recovery of other land of equal value, while the remedy at law upon a covenant is the recovery of pecuniary damages. Whether these covenants are to continue to be expressed at length as at present, or are to be

made to arise by implication or construction from other words or clauses, it is material that the benefit of them should be made to run more perfectly than they now do with the land to which they relate, or (as we have already expressed it) that the party really interested in the land should be entitled to the remedy for breach of the covenant.

Whether it makes any difference that the covenantor has or has not an interest in the land.

Expressions found in some books would lead to the opinion that in considering this class of covenants with reference to the *benefit* of them, there is a distinction between those cases where the covenantor is a party by whom the estate is or has been conveyed, and those in which he is a stranger to the estate.

We think the authority of Lord Coke on this point (which is express) (*a*) sufficient to warrant us in disregarding this distinction; but as the doubt seems to have prevailed extensively, it may be proper that it may be negatived by legislative declaration.

Covenants where the covenantor is seised of the legal fee.

Where an estate in fee simple is conveyed to a person without any limitation of uses, and the covenants are entered into with the same person, and his heirs and assigns, we are not aware that the law requires any alteration or explanation. But where, as is frequently the case, the conveyance is made to effectuate a family settlement through the medium of the Statute of Uses, or in the usual mode for barring dower, it frequently happens that the covenants become severed from the land.

Covenants where the land is settled to uses.

Where the conveyance is such as to transfer a seisin to serve the uses declared (as a feoffment, grant, or lease and release), and the conveyance is to the feoffee or releasee in fee, and the covenants are entered into with him and his heirs, we conceive the Statute of Uses operates as a mode of conveyance, transferring the seisin to the different parties who become from time to time entitled under the uses, whether originally vested or contingent: and consequently that the benefit of the covenants, being annexed to the seisin thus transferred, is perpetually transferred with it. Thus persons claiming under the exercise of powers become entitled to the benefit of covenants which run with the land. But doubts appearing to exist on this point, we think it expedient that the law should be settled by legislative declaration.

Conveyancers usually settle conveyances where dower is to be barred so as to place the seisin in the purchaser himself, and then

(*a*) Co. Litt. 324. b.

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they make him the covenantee. But where (as frequently happens) this is not done, and the fee is conveyed to a releasee to uses, and the covenants are entered into with the purchaser, being merely *cestui que* use, the covenants become covenants in gross, and separated from the land. We think this should be remedied.

Proposal, that the benefit of such covenants shall run notwithstanding want of privity of estate.

We recommend that in all cases the benefit of covenants entered into with the owners of land, and relating to the same land, shall run with the land for the benefit of every person taking the land, or any partial estate or interest in it, either under the covenantee, or under any act of the covenantee, or under any assurance, by, through, or under which the covenantee may claim, (notwithstanding any want of privity of estate with the covenantee, and whether the title of such person arises by way of transfer of seisin, or by way of use, or under the exercise of a power, or otherwise, and whether the covenantor had or had not any previous estate or interest in the land).

Covenants entered into by owners of land.

2. With reference to covenants entered into *by* owners of land, we have to consider only the *burthen* of them. Of such covenants some have relation to interests possessed or acquired by the covenantee, independently of the covenant; such as a covenant to pay a rent-charge issuing out of the land, or to maintain a road over it; others are not connected with any such interests in the land, as a covenant by the owner of a particular close, that it shall never be built on, but always remain an open space. We shall consider these separately, though the alterations we have to propose will apply equally to both.

Whether the burthen of them runs with the land in any case, or whether it depends on privity of estate.

Whether the burthen of such covenants, of either description, runs with the land, so that an action of covenant at law can be maintained against an alienee, seems to have been lately questioned. It has sometimes been considered to depend on privity of estate, that is, on the fact of the party sought to be charged having or not having the estate of the covenantor. In a case often referred to (*a*), the conveyance was to C. in fee to such uses as W. should appoint, and in default of appointment to the use of W. in fee; and a rent was reserved to the grantor in fee, which W. covenanted for himself, his heirs and assigns, that he, his heirs and assigns would pay. Afterwards W. sold the land; and by indentures of lease and release, C. by the direction of W. released, and W. granted and re-

(*a*) *Roach* v. *Wadham*, 6 East, 289.

leased, and also limited and appointed the estate to the purchaser in fee. The court held, that the second conveyance operated as an appointment under the power limited to W. in the first conveyance, and that the second purchaser had not the estate of W., and therefore decided that he was not bound by the covenant for payment of the rent. The Court must, in that case, have considered this distinction as influencing their decision, for they suffered it to be argued at great length (*a*), which would have been unnecessary, if the action would not lie, even supposing the defendant to have had the estate of the covenantor.

Rule of law on this point not clearly laid down.

It is certain that the rule of law as to this point is not very clearly laid down in the old text books; and it may have been the intention of the Judges in Spencer's case, and other authorities, to confine the rule to covenants entered into by lessees. There is, no doubt, ground for distinction between covenants by lessees, and covenants by the owners of the fee.

If the rule were to be applicable to the latter, and if covenants were to be legally binding on alienees of the land to which they relate, we should consider that the distinction on which the case of Roach *v.* Wadham was decided ought to be abolished; and the burthen of the covenant ought to run notwithstanding want of privity of estate, in like manner as we have proposed with respect to the benefit of covenants entered into *with* the owners of land.

Proposal, that the burthen in such case should not run at law.

But we have been led to consider whether there is any good reason why the burthen of covenants of any description, entered into by the owners of land, should in any case run with the land, so far as concerns the legal remedy. In the case of the rent-charge, or of the road, the person entitled to the benefit may secure himself in the enjoyment of it by more express remedies. Powers of distress are usually reserved (and when not reserved are given by statute) for enforcing payment of rents; trespass will lie for the interruption of a road; the addition of a remedy by an action of covenant against the same persons, who would be the objects of the former proceedings, appears to be unnecessary. There are also cases in which the justice and policy of giving the remedy by covenant would be questionable, as where the object to be secured is a rent, and the value of the land charged with it has fallen below the amount of the rent. Upon the whole, therefore, we think it will

(*a*) The present Lord Chief Justice was the counsel who argued for the defendant.

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be most expedient that the legal remedy by action of covenant should not be given in these cases, as well as in those we are about to discuss.

Covenants by the owner of land where the covenantee has no interest beyond the covenant.

Upon the next class of covenants entered into by the owners of land, considerable difficulties are at present met with in practice. We mean covenants entered into by the owners of particular land with the owners of other neighbouring or adjoining land, that the former shall not be built upon, or planted, or so as to impose other restrictions upon the mode of enjoyment of land in favour of persons taking no property in such land.

Examination of the existing law as to these.

An instance of a covenant of this kind is mentioned by Hale, in a note on Fitzherbert's Natura Brevium, tit. Writ of Covenant, fol. 145, or, eighth edit., p. 341. He cites the Year Book, 4 Hen. III. 57, which is not in print.

They are of frequent occurrence.

In modern times such covenants are of frequent occurrence, in cases where the areas of squares or public walks are to be preserved, or where an uninterrupted view of the sea, or of open country, is to be secured to the owners of adjoining houses. Doubts, nevertheless, appear to have been extensively entertained both as to the efficacy of such covenants for the purposes they are intended to answer, and as to their validity. With respect to the former, the principal ground of doubt has been, whether they would run with the land so as to bind all successive owners of it. Judged by the usual rule, (and supposing the rule to be applicable), perhaps this doubt may be thought to be unfounded, for they relate directly and immediately to the land. If such a covenant is not binding, at least in equity, on an assignee of the land, a title to property, the enjoyment of which materially depends upon it, must obviously be defective.

Doubtful whether they run with the land.

The subject not well understood, and has not often been judicially considered.

It does not very clearly appear under what impression as to their effect such covenants have been introduced or sanctioned by practitioners; probably they have seldom been viewed as creating at law any other than a personal obligation. We are not aware of any instance in which an action at law upon such a covenant has been brought against an assignee of the land referred to in it. In a few cases the subject has been brought before Courts of Equity by suit against an assignee of the land; in some of these cases, the Court has refused to interfere by way of injunction, but the validity of the covenant, or its binding the assignee, has never been negatived by decision.

Practitioners have, in many cases, resorted to other contrivances for attaining the same object, such as vesting the land, or a long term of years in it, in trustees upon trust to continue it in the state intended to be guaranteed, or the creation of a rent with powers of distress and entry to arise on the taking place of any alteration in the circumstances of the land.

Other contrivances for the same purpose.

It has been doubted whether covenants of this description (and still more trusts for the same purpose) are not open to the objection of creating a perpetuity. Those who consider that they are so, argue that the doctrine of perpetuity is not confined to a restriction on alienation, but that it applies to every provision or engagement, the effect of which may be to impede the free circulation of property in land, and they contend that, in order to secure that freedom of alienation, land ought not to be capable of being subjected to any burthens or interests which the owner of the fee cannot discharge it from within the period of perpetuity, except rents, rights of way, light and water, and other easements, now acknowledged by the law.

Whether covenants or trusts of this description are obnoxious to the objection of tending to a perpetuity.

We are not aware that this question has even been discussed in any court.

In the case cited by Hale, the covenant was held to be good, but this does not go far towards removing the doubt, for that case occurred at a period long before the law of perpetuity was introduced.

In cases where the property is of sufficient value to bear the expense, it has been usual to obtain private acts of Parliament. It cannot be said that the judges or the legislature, in suffering such acts to be passed, have sanctioned the doubt alluded to, because there have been in most such cases other circumstances, such as the imposition of rates, and making police regulations, which required the interference of Parliament. But such frequent resorts to the legislature, not to mention the heavy expense which they occasion, are objectionable, and certainly ought not to be encouraged, where individuals can make the engagements which their mutual occasions may require by means of common assurances.

Private acts of Parliament have been obtained in many cases.

These covenants being thus of frequent occurrence, and of great importance, we have given the subject very full consideration, with the view to suggest a means of putting the law respecting it on a more satisfactory footing.

To declare generally that such covenants create continuing obli-

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gations, as well at law as in equity, against the owners of land, appears open to much objection. It might not unfrequently lead to persons being rendered liable to an obligation, or at least sued for it, when the existence of the obligation was unknown to them.

A general register would materially facilitate the adjustment of this difficulty.

A general register (which we hope to see established) would remove much of this difficulty. An easy adaptation of the machinery of such a register would put this matter on a footing, in which persons interested under such covenants would be secure of the performance of them, and purchasers of land subject to them would have the means of knowing beforehand the obligations to which they would become liable. It may indeed be mentioned as one of the advantages of such an establishment, that it would afford the only means by which the relief to be derived from the settlement of the law in this particular can be satisfactorily obtained.

On the other hand, a declaration that covenants of this kind are merely personal, or covenants in gross, (if it went the length of precluding the assistance of a court of equity), would be almost entirely to destroy the use of them; for in that case the benefit would scarcely survive the generation in which the obligation was created. The security, so far as regarded the damages to be recovered at law, would be dissipated and lost.

The suitable remedy in such cases is in equity.

The suitable remedy upon such a covenant is to enforce its specific performance; for the breach of it can seldom, if ever, be adequately compensated by damages. The only useful tribunal in such cases must therefore be a court of equity; and on the other hand, in such a court alone proper weight can be given to want of notice. If it should clearly appear that a party, against whom it was sought to enforce such a covenant, was a purchaser for valuable consideration, without notice of the covenant, and without any such negligence on his part as ought to counterbalance the want of actual notice, the Court would refuse to interfere. This state of things could not happen after the establishment of a well-constructed general register, and is not likely often to occur, even without such an establishment. So, if it should appear that the covenant was originally inconvenient and contrary to public policy, either as going beyond the necessity of the case in the quantity of the land covered by it, or in the nature of the restrictions imposed, or that, although not in the first instance open to any such objection, it had subsequently become inconvenient and objectionable

on grounds of public policy, in either case the Court would be at liberty to refuse its interference.

Proposal, that the burthen of covenants entered into by the owners of land shall, in no case, bind alienees at law, reserving the jurisdiction of courts of equity.

The result of the reasoning we have gone into under this and the preceding head is, that the best mode of settling the law as to covenants entered into *by* owners of land, will be, to declare that at law, and for the purpose of conferring a legal right of action, the burthen of them shall not be considered as running with the land; reserving the jurisdiction of courts of equity to interfere by injunction, or otherwise, for enforcing the due observance of such covenants, in all cases in which such courts may deem it proper so to do.

We think all such covenants may remain binding as personal obligations and of the nature of specialties, except in cases where the object and intent may appear to be contrary to public policy; and so far as there may be any doubt as to the legality of any such covenants, we think, with the exception just noticed, they ought to be declared legal, with reference as well to existing, as to future, cases.

Covenants for production of title deeds.

3. We are next to consider the subject of covenants relative to the production and custody of title-deeds.

We have, in our Second Report, pointed out some of the inconveniences felt in practice from the circumstance, that the same deeds or muniments relate to the lands of different parties, and expressed our hope that the establishment of a general register, as recommended in that Report, would remove most of these inconveniences. But still they must remain as to cases occurring previous to the register, and, perhaps, in some degree as to future cases.

How such covenants became necessary and were introduced in practice.

The circumstances which, for a long period, have been gradually breaking up the masses in which landed property previously existed, and making it a subject of commerce, have led to the prevalence of this difficulty to a very serious extent. Perhaps no instance can be adduced, in which the existence of an acknowledged evil has been longer put up with. The accommodating temper of parties, and an adherence to the spirit of private contracts (beyond what their legal import would always warrant), for a long time supplied the want of a legislative provision on this subject. But the great increase in the traffic in land, the alteration which has taken place in professional practice, and the greater degree of attention which minute points have received from courts of justice, have at length made this a very serious source of evil.

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Whether there is a general equity.

In a recent case (*a*), where the vendor had not the custody of the original deeds, but had a covenant for production of them, it was decided that the title was not marketable, because the covenant did not at law run with the land.

It had previously been supposed, either that an original independent equity existed, entitling any party, interested in a deed, to call for its production by any other person having the custody of it, or at least that such an equity existed wherever the parties requiring the production claimed under a person who had taken the precaution to procure a covenant for that purpose, and the person having the actual custody of it derived that custody from or through a person who had entered into such a covenant. In practice it was not considered, that a court of equity would regard the subtle distinctions which we have already stated as prevailing in courts of law between covenants which do, and those which do not, run with the land; distinctions so little understood, that we believe few lawyers would undertake to lay down their exact boundaries. The consequence of the decision to which we have just alluded is, to create an embarrassment in conveyancing, which none but those engaged in its daily practice can be sensible of; for, of the numerous cases in which the muniments of title to property are to be resorted to under existing covenants for production of them, a very small proportion will be found in which the covenant could be said actually to run with the land to which the deeds relate. Provisions on this subject are now often inserted in conditions of sale by auction, and in private contracts, which, being prepared by unskilful persons or without due consideration, lead to difficulties and litigation.

Parties interested ought to be able to enforce the production of deeds.

It seems to us to be a proposition founded in justice, or general convenience, that when several persons are interested in the contents of a deed, each of them should have the means of compelling its production on all lawful occasions.

How it stood upon the old law.

From the proceedings which prevailed under the old law, when warranties were in use, we think it may reasonably be inferred, that the owner of the land for the time being, who had not the custody of the title deeds, had always the means of procuring their production for the purpose of obtaining the benefit of the warranties of preceding owners; and it had been concluded by many

(*a*) *Barclay* v. *Raine*, 1 Sim. & Stu. p. 449.

practitioners, that since the interference of courts of equity had been introduced upon its present footing, a direct and effectual mode of attaining the same object existed in Chancery.

Equity in case of partition.

In favour of coparceners, and in cases of partition under decrees, this equity appears always to have prevailed, and in all other cases where the ownership of lands held under one title has become divided, there seems equal reason for it.

Practice in sales of estates in lots.

In the case of an estate sold in lots, the rule long established in practice has been, that the party purchasing the more valuable portion of the property should have the custody of the deeds, and enter into a covenant for the production of them to the other purchasers. It is probable that this covenant was originally taken to give a remedy at law as well as in equity, but that, in process of time, the practice of taking such covenants occasioned them to be considered as the sole foundation of the right.

Trustees to uses.

When conveyances were made to uses, it was considered that the right to the custody of the deeds was in the feoffees to uses and their heirs; but they could only have been entitled to hold them as depositories for the benefit of all parties interested. There must, therefore, have been a clear equity to compel them to produce the deeds.

Mortgagor and mortgagee.

The case between mortgagor and mortgagee is peculiar. The possession of the deeds is considered a substantial part of the security, and the mortgagee cannot be compelled to produce them, or allow their inspection, till his debt is paid. The remedy for any one claiming under the mortgagor, who may wish to obtain possession of the deeds, is to pay off his mortgage. The effect of this doctrine is, in many cases, to prevent the mortgagor from dealing with his equity of redemption; and upon the whole we see no sufficient reason for continuing this privilege to mortgagees.

Proposal, that every person shewing a right, not inconsistent with that of the party holding a deed, may compel its production.

From these considerations we have come to the conclusion, that the proper mode of removing the difficulty as to title-deeds will be to declare, that every person showing a right or interest, legal or equitable, in land, consistent with the title of the party holding the deeds, may compel the production of them; and we see no reason why such a right should not be enforced by the simplest legal process, such as an order made by a single Judge. It will be proper to place some limit to the facilities which such a law would afford, for it would be easy for any one to pretend an interest in land, and it might be extremely difficult to disprove the existence of such in-

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terest without the production of the deeds, while to produce them would be to give success to the fraud intended. The existence of a covenant to produce the deeds has some advantage in this point of view, because it ascertains the party entitled to claim the production; but we think that is not sufficient to warrant a restriction of the right to the particular case where such a covenant exists.

Party requiring production to state a *primâ facie* case before a single judge;

We think the party, who seeks a production of the deeds, should be required to state a *primâ facie* case, upon affidavit, before a judge at chambers. The party having the custody might answer this case in the same manner, and if there was no greater difficulty than the judge could decide on such affidavits, relief might be given, and an order to produce the deeds made; if a case of doubtful right should be disclosed, it might be proper to leave it for a more solemn decision. In such a case, we think the party, seeking to enforce a production of the deeds, might be left to institute a suit in equity, in which all equitable circumstances might have due consideration.

who, in a clear case, may order the deed to be produced.

In doubtful cases a bill may be filed.

An action on the case might be given to a party interested in the preservation of a deed, to recover damages against any other party, having the custody of it, for any injury or damage which he may sustain, from its being lost or destroyed under circumstances of fraud or gross neglect.

An action on the case may be given for injury or damage.

BOOK III.

OF DIFFERENT KINDS OF ASSURANCES.

CHAPTER I.

OF PURCHASE DEEDS.

Common meaning of "purchase deeds."

In strictly technical language a purchase deed is any deed, by the operation of which a man acquires property, or, at least, real property (*a*). But in the ordinary language of lawyers, a purchase deed means a conveyance in pursuance of a purchase for money; or, in other words, a deed by which, after property has been sold and bought, it is conveyed to the buyer. As the law relating to purchase deeds is fully treated of in Sir Edward Sugden's work on the Law of Vendors and Purchasers (*b*), and the principal points of practice are adverted to in the notes to the Precedents in the third volume of this work (*c*), it is needless to enter into the subject here; it will be more useful to offer a short account of the different kinds of deeds which are employed as purchase deeds.

Feoffment and grant.

The most ancient forms of conveyance are the Feoffment, perfected by livery of seisin, and the Grant. They were the only forms known to the common law (*i. e.* before the introduction of uses) for

(*a*) 2 Bl. Com. 241.

(*b*) 2 Vend. & Purch. ch. xiii. 10th edit.

(*c*) See, particularly, the notes to precedents xvi. and xvii. pp. 192, 205.

the conveyance of freehold estates (*a*). The feoffment, with livery of seisin, was, and is still, the appropriate form of conveyance for an estate in possession, in land or other corporeal hereditaments; while the grant was, and is still, applicable to pass all estates in manors, tithes, advowsons, and other incorporeal hereditaments, and remainders and reversions in corporeal hereditaments. The feoffment has, for the most part, been superseded by other forms of conveyance, but is still sometimes used. One of the occasions on which it is employed, is that of a conveyance by a corporation; for some question having been made whether a corporation can stand seised to a use, it is not considered prudent to take a conveyance from a corporation by lease and release, unless the lease be a common-law lease, perfected by actual entry. And the stat. 4 & 5 Vict. c. 21, for rendering a release as effectual for the conveyance of freehold estates as a lease and release, does not remove the difficulty, because it gives only such effect to the release as it would have if a lease for a year were duly executed, and does not supersede the necessity for actual entry, if such was required to perfect the lease by a corporation. And in some cases it is considered that the feoffment has a more forcible effect than a conveyance by lease and release (*b*). The conveyance by grant is seldom

Feoffment.

Grant.

(*a*) It must be borne in mind that the present chapter does not contemplate exchanges, or the like, but simply purchase deeds, in the vulgar sense, and is speaking of the ordinary course of conveyance at common law.

(*b*) See precedents of feoff-

used at the present day for any other purpose than to pass incorporeal hereditaments (*a*); but for that purpose (when incorporeal hereditaments form the only subject of the conveyance) it is still universally employed. If, however, as very often happens, both corporeal and incorporeal hereditaments are to be conveyed together, it is not usual to convey the incorporeal hereditaments by grant, by a separate witnessing part, because there is no impropriety in conveying incorporeal hereditaments by lease and release; but if the conveyance of the corporeal hereditaments were to be made by feoffment, the incorporeal hereditaments would be separately conveyed by grant. Remainders and reversions of corporeal hereditaments are now generally conveyed by lease and release; for the efficacy of a conveyance by grant would depend on the subsistence of the particular estate, and would, consequently, on future investigations of title, involve the necessity of an inquiry into that fact, unless it were apparent on the face of the deed (*b*).

Release.

Another kind of common-law assurance, often used as a purchase deed, is the release, which is defined to be "a discharge or conveyance of a man's right in

ments, infra, vol. iii. prec. xix. p. 218; and 2 Sanders on Uses (5th edit.), p. 102; see, too, a precedent of a feoffment by a corporation, Id. 105; and, see further, on the subject of feoffments, 2 Bl. Comm. p. 310; 2 Sanders on Uses, 1; 4 Cru. Dig. by White, tit. xxxii. ch. iv.

(*a*) See infra, vol. iii. p. 277, and the precs. xxxi. xxxii. pp. 295, 300.

(*b*) See further, on grants, 2 Bl. Comm. 317; 2 Sanders on Uses (5th edit.), p. 29; 4 Cru. Dig. by White, tit. xxxii. ch. iv.

lands or tenements, to another that hath some former estate in possession" (*a*). There are various kinds of releases; but the only kind which is of much importance as a purchase deed, is that which enures by way of enlarging an estate, and which derives its consequence from forming an essential part of the modern conveyance by lease and release (*b*). If, for instance, there be tenant for life or years, with a remainder to another in fee, a release by the remainder-man to the particular tenant, and his heirs, gives the latter a fee-simple. But the releasee must be in actual possession, either by force of an actual entry, or of an assurance operating under the Statute of Uses, before he can receive an effective release (*c*).

Bargain and sale.

The conveyance by bargain and sale is a conveyance operating under the Statute of Uses. If, before the statute, one man bargained and sold, or, in other words, contracted for the sale of an estate to another, and the purchase-money was paid, but no effective conveyance was executed, the seller or bargainor was considered by the courts of equity as standing seised of the land to the use of, or (in modern language) in trust for, the purchaser or bargainee. The Statute of Uses then declared, that every such bargainee or *cestui que* use should have the possession and legal estate, thereby divesting the bargainor of all estate or interest in the property, and vesting the legal estate

(*a*) 2 Bl. Comm. 324.
(*b*) See infra, p. 389.
(*c*) See further, on the subject of releases, 2 Bl. Comm. 324; 2 Sanders on Uses (5th edit.), 73.

as well as the use or beneficial interest in the bargainee. And this applied not only to all such bargains and sales as were in force at the date of the statute, but to all which might thereafter be executed. Hence, it became sufficient for the conveyance of an estate, that the seller, in consideration of any sum of money, however small, paid to him by the purchaser, should "bargain and sell" the estate to the bargainee, for the bargain and sale raised a use, and the statute immediately annexed the possession and legal estate. A mode of conveyance so simple as this would speedily have superseded the feoffment but for two reasons:—First, that the Statute of Uses enacted, that every bargain and sale whereby an estate of inheritance or freehold should be made to take effect, should be enrolled within six months after its date; and, secondly, that no legal estate could be limited by a bargain and sale to any person except the bargainee; because, from him alone, the pecuniary consideration which gave efficacy to the conveyance proceeded. This consequence of the nature of a bargain and sale rendered it useless, except in those cases in which it was intended to convey the whole estate to the bargainee, and it was not desired to create any powers operating under the Statute of Uses (*a*).

Lease and release.

A mode of conveyance was, however, devised, which, deriving its efficacy in part from the bargain and sale,

(*a*) See further, on the nature and operation of a bargain and sale, 2 Bl. Comm. 338; 2 Sanders on Uses (5th edit.), 53; 4 Cru. Dig. by White, tit. xxxii. ch. ix.

got rid of the difficulties which attached to the bargain and sale itself. This was the conveyance by lease and release which has, in practice, very nearly superseded all other forms of conveyance. The lease is a bargain and sale of the estate made by the vendor to the purchaser in consideration of the sum of five shillings, and for the term of one year. This raises a use in the purchaser, which is immediately executed by the statute so as to give him a term in possession for one year, without the necessity of the actual entry which would be required to perfect a term created by a common-law assurance. No enrolment of the bargain and sale is required, because the provision as to enrolments applies only to such bargains and sales as are intended to pass freehold estates. The purchaser being thus in actual possession for a term, is capable, at common law, of receiving a release of the whole freehold and reversion; and, accordingly, receives such a release by a deed, dated the day after the lease or bargain and sale. In point of fact, the lease and release are always executed together; but the execution of the lease precedes that of the release. It is to be borne in mind that the release which conveys the freehold and reversion, (*i. e.* the whole estate except the term of one year), is a common-law assurance, which operates by transmutation of possession to the releasee, and not by the Statute of Uses, and that, therefore, any uses whatever may be declared on the seisin of the releasee. This, it will be observed, renders the lease and release as convenient as a feoffment for the purpose of creating estates or

limiting powers, while the employment of the bargain and sale for a year, operating by way of use, supersedes the livery of seisin required to perfect a feoffment. It is to be observed, however, that the lease and release may be made wholly a common-law assurance, by substituting for the bargain and sale a common-law demise, perfected by the actual entry of the purchaser; this, however, would be as inconvenient as the livery of seisin; and is, consequently, resorted to only in the case of a conveyance from a corporation, which, it is said, cannot be seised to a use, and, consequently, cannot make a valid bargain and sale. It is also to be borne in mind that if the lease for a year should be made to a stranger instead of to the purchaser, the release to the latter would operate as a grant to him of the reversion, expectant on the term of a year; and after the expiration of that year, his estate would become an estate in fee-simple in possession. Of course it will be understood that, although in practice the bargain and sale is always made for one year, there is nothing material in that period; the creation of a term for any less, or any greater period, would be equally efficacious (*a*).

The practice of the conveyance by lease and release has been completely altered by a recent statute (*b*); but the principle remains unaffected. There is no-

(*a*) See further, on the conveyance by lease and release, 2 Bl. Comm. 539; 2 Sanders on Uses (5th edit.), 73; 4 Cru. Dig. by White, ch. xi.

(*b*) 4 & 5 Vict. c. 21. See the provisions of the statute, and some remarks thereon, infra, vol. v. p. 266, n. (*f*).

thing, however, in the statute to preclude a conveyance with an actual lease for a year, as formerly, and (as previously observed) (*a*) the statute seems to have no bearing on the case where (as in a conveyance by a corporation) a lease, perfected by entry, is required.

Appointment. Another form of purchase deeds is that of an appointment under a power. It is usual in the conveyance of an estate, not to convey it to the intended owner in fee, but to give him an absolute power to declare uses of it; and, subject to this power, to limit it to certain uses in his favour, so contrived as to preclude his wife from any right to dower (*b*). Hence, on a sale of an estate so limited, the owner conveys it to the purchaser by an exercise of his power, which is termed an appointment; and which is, in fact, the declaration of a new use, or new uses, upon the seisin of the feoffee, grantee, or releasee of the original deed, by which the power was created. A great number of the precedents in this collection are precedents of appointments; as it is more common, perhaps, to find that estates stand limited in the way adverted to, than to find them vested in vendors as absolute owners (*c*). It should be observed, that it is the practice to corroborate the appointment by a conveyance by lease and release of the estate limited to the vendor in default of appointment, on the ground that the power may have been extinguished; but when the

(*a*) Supra, p. 386.

(*b*) See infra, vol. iii. p. 205, n. (*a*).

(*c*) See, particularly, infra, vol. iii. prec. xvii. p. 205.

property is small, or (as often happens) the appointment is executed simultaneously with the deed creating the power, the conveyance by lease and release is generally dispensed with (*a*). The conveyance by appointment is also necessarily employed when an estate is conveyed under a power of sale in a settlement. In this case, the parties selling have no estate, or only a particular estate, in the property; but they have a power to revoke the subsisting uses of the settlement, and to declare new uses in favour of the purchaser; *i. e.* to appoint the estate as the purchaser desires (*b*). Sometimes the tenant for life and the trustees to preserve contingent remainders (who are the ordinary devisees of the power of sale) are made, in addition to the appointment, to convey their estates by lease and release; but this practice must be condemned, for, if there is any question as to the efficacy of the appointment, the purchase ought to be altogether abandoned; it cannot (at least in ordinary cases) be the purchaser's intention to take the life estate, and run a risk as to the fee-simple (*c*).

Conveyance in exercise of a common-law power.

There is another kind of conveyance which resembles an appointment in deriving its effect from a power, but is, in substance, altogether different. It is the conveyance in pursuance of a common-law

(*a*) See infra, vol. iii. p. 206, n. See a precedent of a conveyance by appointment alone in the Appendix to this book, No. 1.

(*b*) See infra, vol. iii. prec. xxi. p. 221.

(*c*) See further, as to appointments, 2 Sanders on Uses (5th edit.), 87; 1 Sugd. Pow. ch. vi. sect. 1, and ch. xviii. (6th edit.); 2 Chance on Pow. art. 1458 et seq., and ch. xviii.

authority, and which, in fact, consists merely in nominating the person who is to take; for the purchaser takes, not by force of the instrument by which the power is exercised, but by force of that by which it was created (*a*). A direction, given by will, to sell an estate, without any devise of the estate to the persons who are to make the sale, gives them a power to convey the estate to a purchaser; but such purchaser takes the estate by force of the will, and not of the instrument which professes to act as a conveyance. And in such an instrument the estate clause is not omitted, as in a proper appointment (*b*), but refers to the devisor and not to the devisees of the power (*c*). The usual words employed in executing common-law powers are, "bargain and sell" (*d*).

Assignment.

The kinds of purchase deeds which have been already mentioned (except the last) apply exclusively to freehold estate. The instrument of conveyance of leaseholds, or terms of years, and of every description of personal chattel for which a conveyance is used, is termed an assignment. An assignment is defined by Blackstone (*e*) to be "a transfer or making over to another of the right one has in any estate;" and in modern practice, the term is applied

(*a*) See 1 Sugd. on Pow. p. 251, 6th edit.; 1 Chance on Pow. art. 5 et seq.

(*b*) Infra, vol. iii. p. 232, n. (*s*).

(*c*) See the form of such a conveyance, infra, vol. iii. prec. xxxv. p. 319.

(*d*) See, infra, vol. iii. p. 197, n.

(*e*) 2 Comm. 326; 4 Cru. Dig. by White, 88; infra, vol. iii. p. 196, n.

principally to instruments by which personal estate, or chattels real, or rights in real or personal estate, are expressed to be conveyed. The word "assign" is the proper technical word of assignment; but other words are often added, and any expressions, shewing the intent of the parties to make a complete transfer, will constitute an assignment. Previously to the Statute of Frauds, an assignment might have been by parol only; but by that statute it is enacted, that all assignments of leases or terms for years shall be by deed or note in writing duly signed; and at the present day, all formal assignments are made by deed (*a*). A large number of assignments will be found among the following precedents.

The manner in which copyholds are conveyed to purchasers is explained in a different part of the work (*b*).

(*a*) See *Hodges* v. *Drakeford*, 1 Bos. & Pull. N. R. 270.

(*b*) See, infra, vol. iii. p. 304, n. (*a*), p. 316, n. (*j*).

CHAPTER II.

OF MORTGAGES.

Mortgage—definition of.

A MORTGAGE is defined to be "when things moveable or immoveable, as goods or land, are pledged as a security for repayment of money" (*a*). It may be a question, however, whether this definition draws a sufficient distinction, in the case of a personal chattel, between mortgaging and pawning it. To make the definition complete it should indicate, that the pledge is to be made by a legal or equitable transfer of the property in the things pledged, not depending wholly on actual delivery. The definition, too, must exclude a mere charge, as the case of a portion under a term, in which there is no debt and no right of foreclosure. Generally speaking, a written transfer or agreement to transfer is implied in the idea of a mortgage; but the equitable mortgage made by a simple deposit of the title-deeds of an estate, is an exception to this understanding (*b*). For the ordinary purposes, however, of conveyancers, there is no difficulty in considering a mortgage as a pledge of real or personal estate for securing the payment of money (*c*).

(*a*) 4 Com. Dig. tit. *Mortgage*, A.

(*b*) Infra, vol. iii. p. 156, n. (*c*).

(*c*) A mortgage is defined by

Cannot be made irredeemable.

It is a well-known and long established rule of the courts of equity, that a mortgage cannot, by any stipulation between the parties entered into at the

Mr. Coote (Coote on the Law of Mortgages, 1) "to be *a debt by specialty*, secured by a pledge of lands, of which the legal ownership is vested in the creditor, but of which, in equity, the debtor and those claiming under him remain the actual owners, until debarred by judicial sentence, by legislative enactment, or their own laches." But this definition appears to be open to several observations. Mr. Coote himself justly states in a note, p. 1, to his 2nd edition, and at p. 24, that a mortgage does not necessarily imply a debt by specialty. A mortgage implies a debt, but only a simple contract debt, unless there be a bond or covenant for payment of the money; and it is hardly necessary to say that a mortgage may be, and often is, made without either bond or covenant. "A man," says Lord Thurlow, "mortgages his estate without covenant, yet, because the money was borrowed, the mortgagee becomes a simple contract creditor; and, in that case, the mortgage is a collateral security; and if there is a bond or a covenant, then there is a collateral security of a higher species, but no higher by means of the mortgage merely." (1 Bro. C. C. 464, 465). And to the same effect is Sir Thomas Plumer's judgment in *Quarrell* v. *Beckford*, (1 Madd. 278):—"What is a mortgage? Every body knows it consists of two things; it is a personal contract for a debt secured by an estate." And in *King* v. *King*, (3 P. Wms. 358), it was laid down by the court, that every mortgage implies a debt, for which the mortgagor's personal estate is liable, although there be no bond or covenant for the payment of the mortgage money. There is no ground whatever for stating a debt by specialty as part of the definition of a mortgage. Again, Mr. Coote's definition is hardly correct in terming a mortgage a debt secured by a pledge of *lands*. Even allowing lands to be used in the sense of real estate, and so to include incorporeal hereditaments, (a use of the word scarcely allowable in a technical definition), still the definition of a mortgage should not exclude chattels personal. In practice, mortgages of chattels personal are as common as mortgages of land; and the defini-

time of making it, be made irredeemable; or, as it is often expressed, "once a mortgage, always a mortgage" (*a*). And so, the mortgagee will not be allowed, at the time of making the mortgage, to stipulate with the mortgagor for the purchase of the property at a fixed price, in case default is made in payment of the mortgage money (*b*); although there is no objection to giving the mortgagee a general right of pre-emption, in case the mortgagor chooses to sell the property (*c*). But a conditional or defeasible purchase (*i. e.* an absolute purchase, subject to a power for the vendor to re-purchase within a given time, at a fixed price) has been distinguished from the case of a mortgage (*d*); and, although it is extremely difficult to make out any satisfactory principle for drawing such a distinction, the doctrine has

tion of a mortgage in Comyns's Digest, (supra, p. 396), a work of high authority, expressly includes "things moveable," *i. e.* personal chattels.

Mr. Coote's definition further requires that the legal ownership of the lands shall be vested in the creditor; but a second mortgage, or the mortgage of an equitable estate, (in neither of which cases can the legal estate pass), is just as much a mortgage as a first mortgage by a person having the legal estate; and even an equitable mortgage is essentially as much a mortgage as an ordinary legal mortgage. The true definition of a mortgage must include every case in which there is an actual or implied transfer of property (otherwise than by mere delivery or pawning) as a pledge for the payment of money.

(*a*) Coote on Mortgages, p. 22 et seq. (2nd edit.)

(*b*) Id. p. 27.

(*c*) Ib.

(*d*) *Tasburgh* v. *Echlin*, 2 Bro. P. C. 265; *Endsworth* v. *Griffiths*, 2 Eq. Ca. Abr. 595, pl. 6; 15 Vin. Abr. 468, pl. 8; 5 Bro. P. C. 184; *Sabine* v. *Bawell*, 1 Vern. 268; Coote on Mortgages, pp. 28, 39, (2nd edit.)

been acted on in a very recent case (*a*), and must therefore be considered as well established.

In a recent case (*b*), there was a conveyance of an estate to A., his heirs and assigns, in trust that the same should stand charged with the payment to A., his executors, administrators, and assigns, of a sum of money and interest, and subject thereto, in trust for B. and others, their heirs and assigns; and a power for A., in default of payment, to sell the estate; and it was decided, that this was not a mortgage entitling A. to a decree for foreclosure, but that it entitled him to the aid of the Court of Chancery in effecting a sale. Conveyance in trust for sale not a mortgage.

Mortgages are made by the same forms of assurance, and are framed on the same principles, as conveyances. The narrative recitals for a mortgage will be exactly the same as those of a conveyance of the same property; but, instead of the introductory recital of the sale, will be substituted the recital of the agreement for the loan and mortgage. The conveyance of the property by feoffment, release, appointment, or assignment will be also exactly the same as in a purchase-deed, with the addition to the habendum or to the appointment (to which there is no habendum) of an expression intimating that the assurance is to be subject to the subsequent proviso for redemption. This proviso for redemption follows immediately after the conveyance of the property, Mortgages, how made. Proviso for redemption.

(*a*) *Perry* v. *Meddowcroft*, 4 Beav. 197.

(*b*) *Sampson* v. *Pattison*, 1 Hare, 533.

and is, in modern usage, not a proviso for redemption, but for re-conveyance (*a*). It is the essence of the mortgage—that which makes the conveyance a pledge instead of remaining an absolute conveyance; inasmuch as it stipulates, that, on payment by the mortgagor to the mortgagee of the money intended to be secured at a time specified or to be subsequently specified, the mortgagee shall re-convey the property to the mortgagor. The most usual form of the proviso for redemption is that which stipulates for the payment of half-a-year's interest on the principal at the end of the first half-year, and for the payment of the entire principal and another half-year's interest at the end of the first year (*b*). There does not, however, appear to be any advantage in postponing the time of payment of the principal till the end of the year; and, therefore, in small mortgages, the proviso is often made to stipulate that the principal, as well as the interest, shall be paid at the end of the first half-year (*c*). In neither case is it usually intended that the principal shall actually be paid at the time fixed: the only object is to fix a time, after which the mortgagee may, if he pleases, call for payment of the money. It must be understood, too, that there is no necessity to specify either the end of a year, or of half a year, as the time for payment; any other time may be appointed: thus, in a mortgage for a sum to be paid off by instalments, the first instalment to be

(*a*) See infra, vol. iii. p. 468, n. (*i*).

(*b*) See infra, vol. iii. p. 466.

(*c*) See infra, vol. iii. p. 495.

paid at the end of the first quarter of a year, that time is usually fixed for payment of the whole sum (*a*).

Covenants for payment of principal and interest.

The proviso for redemption is followed by a covenant by the mortgagor with the mortgagee to pay the principal and interest at the times specified in the proviso for redemption, and (unless the nature of the mortgage precludes it, as in a mortgage to secure an account current) by a covenant to pay interest half-yearly on the principal, if the principal is not paid at the time appointed. The subject of these covenants, and of the mortgagee's personal remedies for payment of his money, is discussed in a different part of the work (*b*). It is there observed, that "although custom has established that the covenant for payment of the money shall follow the proviso for redemption, and shall be framed with a reference to the proviso, yet, that it would be more convenient and more conformable to the nature of a modern mortgage, if the covenant were inserted as the first witnessing part of the deed, and were made perfect in itself, and the proviso for redemption were framed with a reference to the covenant." The practice of framing mortgages in the manner here suggested is

(*a*) See infra, vol. iii. p. 594, n. (*h*).

(*b*) See infra, vol. iii. p. 469, n. (*k*), and p. 545, n. (*g*). With respect to the covenant for payment of interest, if the principal is not paid at the day appointed, see *Dickenson* v. *Player*, 4 Price, 282; *Attwood* v. *Taylor*, 1 Mann. & Grang. 279, 297, 307, 321.

not uncommon, and is found to be extremely convenient; and it is intended, if this work should reach a second edition, to re-model the whole of the mortgage precedents upon the same plan. Some precedents of mortgages so framed will be found in the Appendix to this book, and will exemplify what is intended, and at the same time supply some deficiencies in the mortgage precedents.

Covenants for title and proviso for quiet enjoyment.

The covenants for payment of the money are followed by the covenants for title. These covenants are the same as those in purchase-deeds, except that they are absolute instead of qualified (*a*), and that the covenant for quiet enjoyment by the mortgagee is made to take effect only after default in payment of the money. It must, however, be understood that the postponement of the operation of this covenant does not imply that the mortgagor is to have undisturbed possession till default in payment of the money; the mortgagee is at liberty to enter immediately upon the execution of the mortgage deed, and the only effect of the postponement of the operation of the covenant is, that he cannot call upon the mortgagor to protect him against strangers till default has been made in payment of the money (*b*). But, as the meaning of the parties is, that the mort-

(*a*) See supra, p. 357, and infra, vol. iii. p. 471, n. (*l*). See, too, as to the shape of the covenant for further assurance, infra, vol. iii. p. 473, n. (*m*).

(*b*) *Doe* d. *Roylance* v. *Lightfoot*, 8 Mee. & Wels. 553, 564. See, too, *Doe* d. *Lyster* v. *Goldwin*, 1 Gale & Dav. 463; *Wheeler* v. *Montefiore*, Id. 493.

gagor shall have quiet enjoyment of the property till default in payment of the money, in all regularly drawn mortgages a proviso to that effect is inserted immediately after the covenants for title. The appropriate place, indeed, for this proviso is obviously directly after the proviso for redemption and before the covenant for quiet enjoyment by the mortgagee after default in payment, but the custom has been to place it at the end of the covenants for title. It has been stated (*a*) on the authority, principally, of a modern case (*b*), that the proviso for quiet enjoyment until default, coupled with the proviso for redemption, operates as a demise by the mortgagee to the mortgagor for the term given for payment. But the correctness of the decision in the case referred to has been lately questioned (*c*), and a passage in Sheppard's Touchstone (*d*) pointed out, which seems to be at variance with it. The passage in question is, "If A. bargain and sell his land to B., on condition to re-enter if he pay him £100, and B. doth covenant with A. that he will not take the profits until default of payment, or that A. shall take the profits until default of payment; in this case, however it may be a good covenant, yet it is no good lease." Of course, in this state of the authorities, it is impossible to arrive at any certain conclusion on the subject, but the

(*a*) Infra, vol. iii. p. 475, n. (*n*), and p. 497, n. (*o*).

(*b*) *Wilkinson* v. *Hall*, 3 Bing. N. C. 508.

(*c*) *Doe* d. *Roylance* v. *Lightfoot*, 8 Mee. & Wels. 553, 564. See, too, supra, p. 402, n. (*b*).

(*d*) Page 272, (8th edit.)

point is not material with a view to preparing mortgages.

Power of sale.

A power of sale is no essential part of a mortgage (*a*), but is usually inserted in modern mortgages, unless the security be landed property in possession of ample value. For the only way in which reversions, policies of assurance, and other property not producing income, can be made available, is by a sale; and in all cases it is highly desirable that the mortgagee should be invested with power to realize his securities, without being obliged to have recourse to a suit for foreclosure, or to entering into the actual receipt of the rents. In the case of securities (such as reversions and policies of assurance) which produce no income, and can only be made available by a sale, the conveyancer will insert a power of sale without special instructions to that effect; but in the case of other mortgages he will not, as a general practice, introduce a power of sale, unless specially instructed to do so. In some cases, however, he will probably think it right to suggest the expediency of taking a power of sale, as in the case of a mortgage of leaseholds, which it may, obviously, be highly desirable to sell, even though producing a large income.

The principal points relating to powers of, and trusts for sale, in mortgages, are discussed in other

(*a*) Nor is a conveyance in trust to secure a sum of money, with a power of sale in default of payment, a mortgage. *Sampson* v. *Pattison*, 1 Hare, 533, supra, p. 399.

parts of the work (*a*); but there are two recent cases which ought to be noticed. In *Dyson* v. *Morris* (*b*) it has been been held, by Vice-Chancellor Wigram, that although, on a simple mortgage of a policy of assurance, the mortgagee, in default of payment, is entitled to a sale under the decree of a court of equity, yet, if the policy have been assigned to the mortgagee upon trust to receive the monies to become payable, and thereout pay the expenses and mortgage debt, and pay the residue to the mortgagor, (*infra*, vol. iii. p. 613), the court cannot direct a sale of the policy; the mortgagee must wait till the death of the mortgagor, before he can make his security available. Hence, it is most important, that a mortgage of a policy of assurance should contain a power of sale. The other case referred to is *Hobson* v. *Bell* (*c*), which indicates the difficulties of a mortgagee selling under a power of sale, which contains no provision protecting the purchaser from seeing that default has been made in payment of the mortgage money. In well-drawn mortgages this provision is never omitted.

Special clauses in mortgages.

The foregoing remarks relate to mortgages in the ordinary form, and containing only the ordinary provisions. The various special clauses which are inserted as occasion requires, such as covenants for insurance of buildings against loss by fire, covenants

(*a*) Infra, vol. iii. p. 245, n. (*a*), p. 290, n. (*a*) and (*b*), p. 291, n. (*d*), p. 475, n. (*o*), and p. 478, n. (*q*). See, too, *Cooke* v. *Brown*, 4 You. & Coll. 227.

(*b*) 1 Hare, 413.

(*c*) 2 Beav. 17, 22.

relative to the assurance of lives, provisoes for reducing the rate of interest on regular payment, and for not calling in the principal during a certain period, will be found in the precedents of mortgages in vol. iii.; and the chief points of law relating to these special clauses are adverted to in the notes to the clauses themselves. Where such clauses are intended to be introduced, they will generally be specially mentioned in the instructions; but in some cases they are introduced without special directions. Thus, a covenant to insure against loss by fire is always inserted as a matter of course in a mortgage of buildings, when the buildings are a principal part of the security; and an attornment by the mortgagor (*a*) is generally introduced when any substantial part of the mortgaged property is occupied by the mortgagor himself (*b*).

Transfer of mortgages.

It was originally intended to have treated at some length of the law relating to the transfer of mortgages (*c*); but the intention has been abandoned, as it does not appear to the editor, that, in a short compass, any thing of practical value can be added to what is said in the note referred to, and the limits of the work do not admit of going into this or any other subject at much length. All, however, that is of importance will be found in the work of Mr. Coote (*d*), and the other text-books on the subject.

(*a*) Infra, vol. iii. p. 490.

(*b*) See infra, vol. iii. p. 491, n. (*g*).

(*c*) See infra, vol. iii. p. 643, n. (*a*).

(*d*) Book ii. ch. xix. (2nd edit.)

CHAPTER III.

OF LEASES.

A LEASE is defined to be a conveyance of any lands, tenements, or hereditaments, (usually in consideration of rent or other annual recompense), made for life, for years, or at will, but always for a less time than the lessor hath in the premises (*a*). The essential characteristic is, that the interest granted by the lessor should be less than the interest he has himself, for, if he part with his whole interest, the instrument becomes an assignment or a conveyance, instead of being a lease. Considering the transaction in a different point of view, a lease *for years* is defined to be a contract between lessor and lessee for the possession and profits of lands or other hereditaments on the one side, and a recompense for rent, or other income, on the other (*b*); and hence the rule (*c*), that any words which indicate that one party is to give, and the other to take, possession, *primâ facie* constitute a lease. Leases for lives are now seldom granted in England, except by bishops and certain other corporations, and by public trustees; Lease, definition of;

(*a*) 2 Bl. Comm. 317; Touchst. ch. xiv. p. 266.

(*b*) Bac. Abr. art. *Leases.*

(*c*) Infra, vol. iv. p. 4, n. (*c*).

but leases for years form a large part of the subsisting interests in real estate.

—usually contains no recitals.

A lease ought, on principle, to contain precisely the same recitals as to title as a purchase-deed of the same property, and an appropriate introductory recital; but, in practice, a lease is generally made without recitals. This arises partly from the fact that a lessor does not shew his title to the lessee (*a*), and partly from the implied supposition, that the lessor has the absolute ownership of, or power over, the property to be demised (*b*). Occasionally, however, recitals are inserted in a lease, as in the case of an agreement for the lease having been previously entered into, and of mesne transactions having taken place on the footing of such agreement (*c*); and sometimes, in under-leases, the original lease is recited, where the covenants or clauses of the under-lease are framed by reference to those of the original lease.

Statement of consideration in.

The usual and, in most cases, the only considerations stated in a lease are, the rent reserved, and the covenants entered into by the lessee (*d*). If, however, the lease be a building or repairing lease, the monies expended, or to be expended, by the lessee are mentioned as the principal consideration (*e*); and if a premium or fine be paid, the payment of it is stated

(*a*) Infra, vol. iv. p. 16, n. (*c*).
(*b*) See infra, vol. iii. p. 5.
(*c*) See infra, vol. iv. Prec. iii. p. 26.
(*d*) Infra, vol. iv. p. 28, n. (*b*), and the other precedents of leases.
(*e*) Infra, vol. iv. p. 28.

and acknowledged in the same manner as the payment of the purchase-money in a conveyance.

Operative words—parcels, &c.

The ordinary operative words of leases are "demise, lease, and to farm let" (*a*); but the words "grant" and "bargain and sell" are also frequently used. A lease for lives must of course be made by such an assurance as is capable of passing a freehold estate (*b*). The parcels in leases are described as in purchase-deeds (*c*), but the general words are usually more concise (*d*). Leases generally contain exceptions, as of timber and the like, the law respecting which is noticed in a different part of the work (*e*).

Habendum.

The habendums of leases do not call for any particular observation; the subject of habendums generally is discussed in a previous chapter (*g*), and some observations as to the mode of framing them for leases will be found in volume iv. (*h*).

Reddendum.

The habendum is immediately followed by the reddendum, or reservation of rent. A reddendum or reservation is not peculiar to a lease, although at the present day it is seldom found in any other deed. It is defined to be "a clause of a deed whereby the grantor doth reserve some new thing to himself out of that which he granted before" (*i*). It differs from an exception, in that a reservation is a thing not in

(*a*) Infra, vol. iv. p. 28, n. (*b*).
(*b*) Supra, ch. i. p. 385.
(*c*) Supra, b. ii. ch. vi. p. 339.
(*d*) Infra, vol. iv. p. 29, n. (*e*).
(*e*) See infra, vol. iv. p. 44, n. (*a*), p. 45, n. (*b*), and the authorities there referred to; see too, supra, p. 344.
(*g*) Supra, b. ii. ch. vii. p. 345.
(*h*) Page 29, n. (*d*).
(*i*) Touchst. 80; 2 Bl. Comm. 299.

esse before, but newly created out of the thing granted or demised; while an exception is a thing in esse before, and part of the thing granted or demised (*a*). In the case of mines, however, in which the rent or royalty reserved is sometimes a proportion of the ore gotten, it seems doubtful whether such proportion of the ore is a reservation or an exception; but the result of the cases appears to be, that if the ore is reserved, it is an exception, but if the manufactured metal, a proper reservation (*b*). A reddendum must be of a thing whereto the grantor may have resort to distrain, *i. e.* it must be reserved out of corporeal hereditaments; and therefore the reservation of a rent, reserved out of incorporeal hereditaments alone, will be a void reservation (*c*). A rent, however, so reserved is void only as a reservation, for it may be recovered in an action of debt, if the demise be made by deed (*d*), or of course in an action of covenant, if the lessee have entered into a covenant for payment of the rent. If a rent be reserved on a demise by deed of corporeal hereditaments together with incorporeal hereditaments or personal chattels, the rent will be held to

(*a*) Co. Litt. 47. a.; infra, vol. iv. p. 44, n. (*a*). See, however, Co. Litt. 143. a., n. (1).

(*b*) *Campbell* v. *Leach*, Amb. 740; *Basset* v. *Basset*, Id. 843; *Buckley* v. *Kenyon*, 10 East, 139; *The King* v. *The Earl of Pomfret*, 5 Mau. & Sel. 139; *The King* v. *The Inhabitants of St. Austell*, 5 B. & Ald. 693. See, too, infra, vol. iv. p. 138, n.; and *Denys* v. *Shuckburgh*, 4 You. & Coll. 42; *The Queen* v. *Todd*, 4 Per. & Dav. 335; *The Queen* v. *Crease*, 3 Per. & Dav. 434.

(*c*) Touchst. 80; 4 Cru. Dig. by White, 275.

(*d*) Ib.

be issuing solely out of the corporeal hereditaments, and they may be distrained on accordingly (*a*); but if the demise be of lands and incorporeal hereditaments, by an instrument not under seal, no distress can be made, because there is no valid demise at all of the incorporeal hereditaments, and no distinct rent reserved for the lands (*b*). The rent or other thing reserved must either be reserved generally, or to the grantor and his heirs; or, in the case of a lease by a person having a chattel estate only, to the grantor, his executors and administrators (*c*). A reservation to a stranger is bad, although in most cases the rent reserved to a wrong person will follow the reversion (*d*). The rent reserved on a lease is usually made payable half-yearly or quarterly, but this depends wholly on the contract, except that in leases under powers, which prescribe that the rent shall be made payable at any particular times, the terms of the powers must be strictly complied with (*e*). If rent be reserved generally, it is payable at the end of the year (*g*). Several rents may be, and in practice frequently are, reserved upon one grant (*h*), of which the precedents of leases in the fourth volume

(*a*) *Farewell* v. *Dickenson*, 6 Barn. & Cress. 251.

(*b*) *Gardiner* v. *Williamson*, 2 B. & Ad. 336. See, too, *The Queen* v. *The Inhabitants of Hockworthy*, 2 Nev. & Per. 383.

(*c*) Toucht. 80; Lit. sect. 346.

(*d*) Infra, vol. iv. p. 73, n. (*b*). See, too, Id. p. 31, n. (*f*).

(*e*) 2 Sugd. Pow. (6th edit.), 439.

(*g*) See the cases cited infra, vol. iv. p. 47, n. (*c*); and the remarks on this subject in the note referred to.

(*h*) Touchst. 80; 4 Cru. Dig. by White, 276.

supply sufficient examples. Thus, penal rents are often reserved, to arise on the commission of certain acts (*a*); and, in mining leases, the reservation of different rents for different years of the term, and for different kinds of produce, is very common (*b*).

A lease usually contains several covenants on the part of the lessee, and at least one (that for quiet enjoyment) on the part of the lessor. The question, what are usual and proper covenants is discussed in a subsequent volume (*c*), and most of the other points relating to covenants in leases are adverted to in the notes to the same volume (*d*). The covenants on the part of the lessor are entered into with the lessee, his executors, administrators,

(*a*) Infra, vol. iv. p. 49, n. (*d*).

(*b*) See particularly, infra, vol. iv. pp. 122—124.

(*c*) Infra, vol. iv. p. 13. See, too, the recent case of *Page* v. *Broom*, 3 Beav. 36, as to the covenants to be entered into by the representatives of a person who had agreed to grant, but died before the granting of, a lease; and see, as to covenants in mining leases, *Blakesley* v. *Whieldon*, 1 Hare, 176.

(*d*) As to the covenant for payment of rent, implied from the reddendum in the absence of an express covenant, see infra, vol. iv. p. 30, n. (*e*); as to covenants to pay rates and taxes, Id. p. 32, n. (*g*); as to covenants against carrying on trades and businesses, Id. p. 36, n. (*h*); as to covenants not to assign or underlet without the lessor's license, Id. p. 60, n. (*h*); as to covenants relating to the removal of fixtures, Id. p. 87, n.; as to covenants to repair, Id. p. 114, n. (*c*), and the late case of *Green* v. *Eales*, 1 Gale & Dav. 468; as to covenants to insure and repair in case of fire, Id. p. 104, n. (*f*); and as to the lessor's covenant for quiet enjoyment, both express and implied, Id. p. 40, n. (*h*), p. 39, n. (*i*), p. 117, n. (*e*), and the late cases of *Granger* v. *Collins*, 6 Mee. & Wels. 458; *Schreiber* v. *Creed*, 10 Sim. 9.

and assigns; but if the covenant be such a covenant as will not run with the land, an assign can sue upon it only in the name of the lessee, his executors, or administrators (*a*). If the lessor be seised in fee, the lessee covenants with him, his heirs, and assigns; and if the lessor have himself only a chattel interest, with him, his executors, administrators, and assigns; but the power of the assignee of the lessor to sue on the covenants in his own name, depends in each case on the question whether the covenants are such as will run with the land (*b*). The greatest difficulty in determining with whom the covenants should be entered into arises when the lease is made under a power, and the legal estate is in settlement; but it seems to be now pretty well settled, that if the lessee is made to covenant with the tenant for life and his assigns, the benefit of the covenant will enure to the remainder-men, and the burden of the covenants entered into by the tenant for life will also fall on the remainder-men (*c*).

A lease usually contains, and should always contain, a proviso for re-entry by the lessor on default by the lessee in payment of the rent or performance of any of the covenants. The points to be attended to in framing this proviso are adverted to in some of the notes to the precedents of leases (*d*). Proviso for re-entry.

(*a*) See supra, book ii., ch. viii., p. 353, and the Appendix, p. 368.
(*b*) Ib.
(*c*) See infra, vol. iv. p. 75, n. (*c*), and supra, p. 365. See, too, 2 Sugd. Pow. 338.
(*d*) Infra, vol. iv. p. 68, n. (*k*), p. 81, n. (*e*), p. 92, n. (*c*).

Who may make leases.

Leases may be made by all persons who would be competent to convey the property absolutely; and by particular statutes many other persons, such as committees of lunatics, tenants in tail, ecclesiastical persons, and married women, are enabled to grant leases under certain restrictions. The law relating to such leases is very voluminous, and cannot be satisfactorily stated within the compass of this work; it must therefore suffice to refer to the text-books, in which ample information on the subject will be found (*a*).

(*a*) 4 Cru. Dig. by White, *for Years;* Burton's Law of Real Property, (arts. 217, 237, 714, 716, 721. tit. xxxii. ch. v. sect. 29 et seq.; Bac. Abr. tit. *Leases and Terms*

CHAPTER IV.

OF PARTITIONS.

A PARTITION is where two or more joint-tenants, coparceners, or tenants in common agree to divide their lands in severalty, each taking a distinct part (*a*). Several methods of partition are mentioned by Littleton, sect. 243 et seq., and in Mr. Hargrave's note, Co. Litt. 169. a., n. (2); but in modern practice partition is made only by conveyance or by act of Parliament. The common-law writ of partition has been abolished by statute (*b*), and partition by the decree of a court of equity can be effectuated only by conveyance or act of Parliament (*c*). If any of the parties whose concurrence in the partition is required are under disability, the decree can only be to make partition, give possession, and order enjoyment accordingly until effectual conveyance can be made (*d*), unless it should be deemed ex-

Partition—definition of.

—modes of effectuating.

(*a*) 2 Bl. Comm. 324.

(*b*) 3 & 4 Will. 4, c. 27, s. 36.

(*c*) *Whalley* v. *Dawson*, 2 Sch. & Lefr. 372. Commissioners acting under the authority of the General Inclosure Act (41 Geo. 3, c. 109) are empowered by s. 16 of that act to make partition of tenements held in joint-tenancy, coparcenary, or tenancy in common, and of the allotments made in respect thereof, and such partition will be binding on persons under disability.

(*d*) Mitford on Pleading, 120, (4th edit.)

pedient to obtain an act of Parliament to effectuate the partition immediately. An act of Parliament is of course resorted to only when some of the parties interested are under disability; and when obtained it operates as a conveyance of the legal estate, and binds the persons under disability, as well as all those who are free from disability (*a*). The preparation of such acts is part of the business of a conveyancer, but does not come within the scope of the present work. The following observations apply to partition by conveyance, in which all persons who are interested are to join; and it should be remarked that the form of the conveyance will be the same whether the partition is voluntary or is compelled by the decree of a court of equity. In the latter case, instead of the recital of the agreement for partition, must be substituted recitals of the proceedings in the suit, and of the Master's approval of the conveyance (*b*).

(*a*) See a precedent of an agreement to make a partition, and to apply for an act of Parliament to give effect to it, infra, vol. iii. p. 147.

(*b*) *Att.-Gen.* v. *Hamilton*, 1 Madd. 222. The jurisdiction and practice of the Court of Chancery in respect to partition are discussed in the recent cases of *Manners* v. *Charlesworth*, 1 My. & K. 330; *Story* v. *Johnson*, 1 You. & Coll. 538; S. C. 2 You. & Coll. 586; *Hollingworth* v. *Sidebottom*, 8 Sim. 620; *Lister* v. *Lister*, 3 You. & Coll. 540. It should be observed that a court of equity cannot decree a partition of copyholds (at least of tenants in common) without the license of the lord of the manor. *Horncastle* v. *Charlesworth*, 11 Sim. 315. It has been lately decided, that a person who has only a life estate determinable on his marriage in a share of the estate, may insist on a partition as to that share; *Hobson* v. *Sherwood*, 4 Beav. 214; but the partition need not be extended beyond that share. Ib. See, too, *Gaskell* v. *Gaskell*, 6 Sim. 643.

—of what it may be made.

Partition may be made of every kind of property, whether corporeal or incorporeal; but in the case of copyholds, the consent of the lord of the manor must be obtained (*a*). And it is said, that a partition of lands entailed on coparceners, if equal at the time of the partition, will bind the issue in tail (*b*). A rent-charge may be parted without the consent of the owner of the lands charged, and the lands will be subject to several distresses for the several parts (*c*); but the rent-service incident to a reversion, of which partition is made, cannot be apportioned as against the tenant, without his consent (*d*). With respect to the method of parting an advowson, see infra, vol. iv. p. 240, n. (*g*); and as to a manor, see infra, vol. iv. p. 338, n. (*f*).

Partition by conveyance—how effectuated.

At common law coparceners might have made partition of things lying either in livery or grant, by parol without deed, and tenants in common might have made partition of things lying in livery by parol without deed, if they afterwards perfected the partition by livery of seisin (*e*). So, too, joint-tenants for years might have made partition by parol without deed (*g*). But joint-tenants of freeholds, whether corporeal or incorporeal, and tenants in common of incorporeal hereditaments, could not have made partition without deed (*h*). Since the Statute of Frauds

(*a*) Supra, p. 416, n. (*b*).

(*b*) Co. Litt. 173. b.

(*c*) *Rivis* v. *Watson*, 5 Mee. & Wels. 255.

(*d*) Infra, vol. iii. p. 73, n. (*a*); *Roberts* v. *Snell*, 1 Mann. & Grang. 577.

(*e*) Litt. sect. 250; Co. Litt. 169. a.

(*g*) Co. Litt. 187. a.

(*h*) Co. Litt. 169. a.

(20 Car. 2, c. 20), a writing is in all cases necessary, but a deed is required only in cases in which it was necessary before the statute (*a*). Joint-tenants and coparceners being seised *per mie et per tout*, i. e. each having already a seisin of every part, may make partition by mutual releases, without livery of seisin, or a lease for a year, but tenants in common, having distinct undivided freeholds, can only convey by feoffment with livery, lease and release, or some other method by which a freehold estate may be conveyed (*b*). And on a partition between coparceners, a rent may be granted for equality of exchange without a deed, and a power of distress will, as of common right, be incident to such rent (*c*). The different methods, however, of making partition which the law allows, are not of much practical importance in the preparation of deeds of partition, because, at the present day, all parties, whether coparceners, tenants in common, or joint-tenants, are made to join in a conveyance by lease and release of the entirety of freeholds, and in a surrender of the entirety of copyholds, and in declaring new uses of the parts to be taken in severalty (*d*). A partition of leaseholds is, indeed, often made by mutual assignments, in order to avoid the expense of an additional deed (*e*), but the assign-

(*a*) The assertion in 2 Bl. Comm. 324, and in 4 Cru. Dig. by White, 77, that the statute has made a deed in all cases necessary, is a mistake.

(*b*) Co. Litt. 169. a., 200. b.; *Chester* v. *Willan*, 2 Saund. Rep. 97.

(*c*) Litt. sect. 251, 252; Co. Litt. 169. a., 169. b.

(*d*) See infra, vol. iv. p. 209.

(*e*) See infra, vol. iv. p. 253, n. (*a*).

ments will be sufficient to pass the interests, whether the parties be tenants in common, or joint-tenants, and without regard to their relation to each other.

References to notes on the law of partition.

Most of the important points relating to the frame of partition-deeds are noticed in the notes to the precedents (*a*). But it may be observed, that a partition at common law between coparceners implies a warranty for the coparceners and their heirs, but not for their assigns, and therefore, after an assignment by one party, the warranty ceases (*b*); and of course, if covenants for title are inserted (as they always are in modern partition-deeds), no warranty is implied. There is no warranty implied on partition between joint-tenants or tenants in common, nor even between coparceners, when the partition is made, according to the present practice, by a conveyance to uses (*c*).

Partition implies a warranty—when.

Partition—whether it may be made by virtue of a power of sale and exchange.

Every well-drawn settlement, whether by deed or will, of an undivided share contains a power of partition (*d*). But it has been suggested, that a partition may be made in the absence of an express power for that purpose by aid of the ordinary power of sale and exchange. In *Abel* v. *Heathcote* (*e*), Lord Ross-

(*a*) See, as to the parcels, infra, vol. iv. p. 212, n. (*c*), p. 246, n. (*a*); as to the general words and the effect of a partition on easements enjoyed by one part of the estate over the other, infra, vol. iv. p. 217, n. (*h*), p. 220, n. (*k*); and, as to the covenants for title, and, with whom they should be entered into, infra, vol. iv. p. 225, n. (*n*), p. 224, n. (*m*), and p. 256, n. (*e*).

(*b*) Co. Litt. 173. a., 174. a., 384. a.

(*c*) 4 Cru. Dig. by White, 77.

(*d*) See infra, vol. iv. p. 625; and the better form infra, vol. v. p. 225.

(*e*) 4 Bro. C. C. 278; S. C. 2 Ves. jun. 98.

lyn held, that a power of sale *and exchange* authorized a partition, on the ground that a partition was in effect an exchange; but this decision was questioned by Lord Eldon, in *M'Queen* v. *Farquhar* (*a*), and by Sir Thomas Plumer, in the *Attorney-General* v. *Hamilton* (*b*); and in the former case it was determined, that a power of sale alone would not authorize a partition. It was suggested by Lord Rosslyn (*c*), that, under a power of sale, the undivided share may be sold, and the money laid out in the purchase of the divided part, and the suggestion appears to meet with the approbation of Sir Edward Sugden (*d*); but it would hardly be prudent to accept a title under such a transaction, till the validity of it has been affirmed by express decision. See further on this subject, 2 Sugd. Pow. 504 et seq., 6th edit.; 2 Chance on Powers, div. 2488 et seq.

A power to make partition of an estate will not authorize a sale nor an exchange (*e*).

Dower—to be released on partition—when.

The wives of joint-tenants are not dowable (*e*), and therefore need not concur in a partition; but the wives of tenants in common and coparceners are dowable of their husbands' undivided shares (*g*), and must therefore be parties to and acknowledge the partition-deed, in order to release their dower (*h*).

(*a*) 11 Ves. 467.
(*b*) 1 Madd. 214.
(*c*) 2 Ves. jun. 101.
(*d*) 2 Sugd. Pow. 507, (6th edit.)
(*d*) Shepp. Touchst. 292; 2 Sugd. Pow. 504, (6th edit.); 1 Madd. 223.
(*e*) Litt. sect. 45.
(*g*) 1 Cru. Dig. by White, 162.
(*h*) See infra, vol. iv. p. 229, n. (*o*).

—how affected by.

And where a widow concurred with the trustees of her husband's will in a partition of her husband's estate, and released from her dower the divided part conveyed to the other tenant in common, it was held, that she was entitled to her dower out of the entirety of the divided part conveyed to the trustees of her husband's will (*a*).

Mistake on partition rectified.

If, in making a partition, a mistake be made, a court of equity will, as in other cases, rectify the mistake by directing a pecuniary compensation, or otherwise as the case may require (*b*).

(*a*) *Reynard* v. *Spence*, 4 Beav. 103.

(*b*) *Dacre* v. *Gorges*, 2 Sim. & Stu. 454; and see, too, *Story* v. *Johnson*, 1 You. & Coll. 538; S. C. 2 You. & Coll. 586.

CHAPTER V.

OF EXCHANGES.

Exchange—definition and requisites of.

AN exchange is a common-law assurance between two parties, whereby (as the name imports) hereditaments are exchanged the one for the other (*a*). To the perfection of an exchange four things are necessary. First, that the estates exchanged be equal in quantity, i. e. a fee simple for a fee simple, or a life estate for a life estate. Equality in value is not necessary; neither is equality in the manner of the estate required, for an exchange between joint-tenants and a sole tenant is good. And although real estate cannot be exchanged for personal, corporeal hereditaments may be exchanged for incorporeal, as land for a rent or common (*c*). Secondly, that the word "exchange" be used; its effect cannot be supplied by any circumlocution, or by any other word. Thirdly, that there be an execution by entry or claim, by each party. If either die before entry or claim, the exchange is void (*d*). Fourthly, that if the hereditaments to be exchanged lie in different counties, or be incorporeal, the exchange be by deed indented. Since the

(*a*) 2 Bl. Com. 323; Touchst. 289.
(*b*) Co. Litt. 516.
(*c*) Co. Litt. 50. b.
(*d*) Co. Litt. 50. b., 51. b.

Statute of Frauds, all exchanges must be made by writing, and in practice an indenture is invariably used.

—cannot be between more than two parties.

An exchange cannot, from its nature, be between more than two parties, although each of those parties may consist of any number of persons (*a*).

Implied warranty and right of re-entry in a common-law exchange.

In every exchange there is an implied mutual warranty of title, with a right of re-entry for either party in case of eviction; but such right of re-entry extends only to the parties and their heirs, and not to their assigns (*b*). The inconvenient consequences of this doctrine have been already pointed out (*c*), and are so serious, that the right is now generally negatived by an express provision in the deed of exchange. The common-law exchange is, however, an obsolete form of assurance. Exchanges themselves have become much less frequent than in those days when money was scarce and little used; and when an exchange is now made, it is effectuated by mutual conveyances, each in consideration of the other, and each containing the usual covenants for title entered into by vendors with purchasers, and a clause negativing the implied warranty and right of re-entry (*d*). A power of exchange is always coupled with the power of sale in a settlement, either by deed or will; but exchanges by virtue of such powers are of course

Modern method of exchange by mutual conveyances.

(*a*) Hargr. & Butl. Co. Litt. 50. b., n.(1), 51. a., n. (1); *Eton College* v. *The Bishop of Winchester*, 3 Wils. 483, 491.

(*b*) Supra, p. 171.

(*c*) Infra, vol. iii. p. 59, n. (*h*); p. 135, n. (*a*).

(*d*) Infra, vol. iv. pp. 260, 263.

effectuated by revocation of the old, and appointment of new, uses. It has been suggested, that the use of the words "in exchange" in mutual conveyances and appointments by way of exchange, may cause such of the incidents of a common-law exchange, as the circumstances of the case will admit, to attach to the transaction, at least in equity (*a*); but it should be understood that this is very doubtful, and at any rate the most convenient course seems to be, to avoid treating such matters in any way as exchanges, and to deal with them as mutual sales and purchases. It has been doubted, however, whether this course can be prudently adopted in an exchange under a power of exchange (*b*).

Law relating to powers of sale and exchange.

The points which have occurred on the construction and operation of powers of sale and exchange are fully discussed in 2 Sugd. Pow., chap. xviii, 6th edit.; 2 Chance on Powers, chap. xviii, sect. 1 (*c*).

Exchanges by virtue of certain statutes.

Exchanges are often made under inclosure acts (*d*), and by charities and ecclesiastical persons under the statutes which have been passed for enabling them to make such exchanges (*e*), but these exchanges have none of the incidents of a common-law exchange.

(*a*) Infra, vol. iii. p. 135, n. (*a*); vol. iv. p. 269, n. (*e*).

(*b*) 2 Chance on Powers, 382.

(*c*) See, particularly, the subsections, 9 and 10; and see infra, p. 438.

(*d*) Supra, p. 171.

(*e*) See infra, vol. iv. prec. xx., p. 273, and prec. xxiv., p. 297.

CHAPTER VI.

OF SETTLEMENTS.

THE earliest form of settlement appears to have been the creation of the fee-simple conditional (*a*). By this means the absolute power of alienation was suspended till the birth of issue, and the estate might be made to devolve through a particular line of heirs in exclusion of others. Thus, an estate might be settled by a person upon his eldest son and the heirs of his body, and in default or failure of such heirs upon his second son and the heirs of his body, and so on upon the other sons successively, and the heirs of their bodies; and on default or failure of all these upon the settlor himself in fee (*b*). The Statute de Donis took away the power of alienation, and created the well-known estate called an estate tail (*c*), and this was probably the only kind of settlement in use from the passing of the Statute de Donis till the invention of the method of barring estates-tail by fine and recovery. The estate was effectually preserved in the line of the settlement, but the power of alienation and re-settlement was totally precluded (*d*.)

Settlements by creation of a fee-simple conditional.

—of an estate tail.

(*a*) 2 Bl. Comm. 110.
(*b*) Hargr. & Butl. Co. Litt. 290. b., n. (1), V. 1.
(*c*) 2 Bl. Comm. 112.
(*d*) Hargr. & Butl. Co. Litt. 290. b., n. (1), V. 2

—by means of the statutes 11 Hen. 7, c. 20, and 32 Hen. 8, c. 28.

The next kind of settlement, and one which remained in use for a long time, owed its origin to the stats. 11 Hen. 7, c. 20, and 32 Hen. 8, c. 28. By the former of these statutes, women seised of estates-tail of the gift of their husbands (*ex provisione viri*, as it was called), and by the latter, husbands seised of such estates in right of their wives, were prohibited from alienating them; and therefore it became usual to limit the husband's estate to the husband and wife, and the heirs of the body of the wife by the husband, and the wife's estate to the husband and wife, and the heirs of the body of the husband by the wife. By this means the estates were secured to the parents during their lives, and afterwards to the issue, against the act of either parent alone; nothing but the concurrence of both parents, or the surviving parent, and the issue, could alienate the estate. And as the stat. 32 Hen. 8, c. 28, enabled husbands and wives, and tenants in tail, to grant leases binding on the wives and their heirs, and the issue in tail, it is obvious that this mode of settlement left the parties sufficient power over the estate, while it afforded protection against the extravagance or misconduct of any one party. Mr. Butler, indeed, has suggested (*a*) that it might well be used at the present day when the property is small, or the length of a modern settlement is for other reasons objectionable, but the suggestion cannot now be acted on as to the husband's estate, because the stat. 11

(*a*) Hargr. & Butl. Co. Litt. 290. b., n. (1), V. 3.

Hen. 7, c. 20, has been repealed by the Statute for the Abolition of Fines and Recoveries (*a*).

—by the limitation of estates for life to the parents with remainder to the issue as purchasers.

The last kind of settlement is that now in use. Estates for life are limited to the parents, or one of the parents, with remainder to the children, or some of them, in tail or in fee, as purchasers. This kind of settlement is said to have been introduced soon after the invention of barring estates tail by fine and recovery, but it did not for a long time come into general use. For if the parent was the immediate reversioner, or could procure the concurrence of the immediate reversioner, he could, by alienating or surrendering his own estate, destroy the contingent estates of the unborn children. But this objection was obviated by the limitation of an estate to trustees, to take effect on the forfeiture or other determination of the life estate, in trust for the tenant for life, and to preserve the contingent remainders. The estate so limited has been long settled to be a vested estate of freehold, and by interposing an estate of freehold, over which the tenant for life has no control, effectually prevents him from destroying the contingent remainders by a forfeiture or surrender of his own estate. The contingent remainders might, indeed, be destroyed by the concurrence of the trustees, for if they should join in conveying the estate to a person for valuable consideration, and without notice of the trust, the remainder-men would lose the estate,

(*a*) By the act 3 & 4 Will. 4, c. 74, s. 17.

and would have only a personal remedy against the trustees for the breach of trust (*a*).

—by limiting an estate for years to the parent determinable on his life.

In some modern settlements the estate, instead of being limited to the husband for life, is limited to him for ninety-nine years if he shall so long live, and subject thereto to trustees for his life, in trust for him and to preserve the contingent remainders, with remainder to the issue in tail. The advantage proposed to be obtained by this mode of settlement is postponing the power of completely barring the entail till the death of the husband, inasmuch as although the issue when of age may alone levy a fine, and acquire a base fee, yet no recovery can be suffered during the husband's life without the concurrence of the trustees who have the first estate of freehold. It seems, indeed, that it is no breach of trust for the trustees to concur with the issue in suffering a recovery, and that in some cases a court of equity will compel them so to do, but still this mode of settlement has a strong tendency to postpone the power of alienation beyond the time at which it would be acquired under the common limitation of the first estate to the husband for life. For in this case the concurrence of the trustees is not required, and the husband and issue can

(*a*) Hargr. & Butl. Co. Litt. 290. b., n. (1), V. 4. See further on the subject of the estate and duty of the trustees to preserve contingent remainders, 2 Cru. Dig. tit. xvi. ch. vii.; Burton on the Law of Real Property, arts. 775—779, and art. 1449. Infra, vol. v. p. 155, and the authorities cited infra, vol. iv. p. 502, n. (*g*).

acquire an absolute power over the property. It has been felt, however, that the inconvenience of making the husband only tenant for years, and giving the first estate of freehold to strangers, is so considerable, that it is not compensated by the obstacles thrown in the way of alienating the estate; and, indeed, it is obviously most desirable, that, as soon as the son comes of age, he should be able, with the concurrence of his father, to put an end to the settlement, and to re-settle or alien the estate, as circumstances may render convenient (*a*). This form of settlement has now indeed fallen into disuse; and, as a general rule, it may be stated, that in settlements of the present day the first estate of freehold is an estate limited to the husband for his life, followed by the limitation to trustees during his life, in trust for him, and to preserve the contingent remainders.

Advantage of a modern settlement.

The limitation of an estate to the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the issue successively in tail male or in tail, is the principal characteristic of a modern settlement, and seems to be all that is necessary to constitute "a strict settlement" (*b*). But the great advantage of a modern settlement is, that it not only suspends the absolute power of alienation till the eldest son attains twenty-one years, but that it makes a convenient provision for the wife and younger children, and by means of powers of leasing, enfranchisement, partition, and

(*a*) See 2 Cru. Dig. tit. xvi. ch. vii.; Burton, art. 1449.

(*b*) Infra, vol. iv. p. 609, n. (*a*).

sale and exchange, gives the tenant for life and trustees full power to deal with and dispose of the estate for all proper purposes, whilst it effectually protects the interests of the child, the tenant in tail.

Limitations of a settlement on marriage.

It will be convenient to explain briefly the manner in which these objects are now effectuated; and that will be best done by examining the limitations and powers of a settlement executed upon marriage, because marriage settlements are much more common, and at the same time more simple and regular in their structure than other settlements.

Term of years to raise pin-money for the wife during the coverture.

If the intended husband is seised in fee, or has an absolute power of appointment, the first limitation in a settlement of a great estate, will be to the use of trustees for a term of years, in trust to raise an annuity for the separate use, or what is called the pin-money, of the intended wife during her coverture (*a*). This is intended to furnish the wife with the means of providing for her dress and personal expenses independently of her husband, and so much is the object of it considered by the courts of equity, that the wife herself cannot recover more than one year's arrears of her pin-money, and her representatives can recover no arrear at all, if her personal expenses have been paid by her husband (*b*).

(*a*) Infra, vol. iv. pp. 501—505.

Validity of the restraint on anticipation of a married woman's interest in real estate.

(*b*) See the cases cited in *Earl Digby* v. *Howard*, 4 Sim. 588; and *Howard* v. *Digby*, 8 Bligh, N. R. 224, reversing the decision in *Earl Digby* v. *Howard*. The trust of the wife's pin-money for her separate use is always accompanied with a restriction on anticipation, so as to render the provision inalienable. It should,

If the father of the intended husband be living, and be tenant for life of the estate to be settled, with

Provision for the husband and wife when, at the execution

however, be observed, that opinions have been given by two conveyancers of eminence, that no effectual restraint on anticipation can be annexed to a provision for a married woman arising out of real estate. Their argument seems to be this :—

The common trust for the separate use of a married woman gives her an equitable estate, together with a power of appointment or disposition appendant to that estate. This equitable estate she could formerly have conveyed by levying a fine, and now by executing an acknowledged deed under the statute 3 & 4 Will. 4, c. 74; and of course, when the estate is alienated, the power of appointment or disposition, being wholly appendant to the estate, is extinguished. Now, the restriction on anticipation is a restriction on the power of appointment or disposition, and of course falls with the power, when the power is extinguished by the alienation of the estate; and the restriction cannot prevent the alienation of the estate; for in Miss Watson's case, in which it was first introduced, Lord Thurlow declared, "I do not hereby take away any of the incidents of property at law; this interest (the separate use) which a married woman is suffered to take is a creature of equity, and equity may modify the power of alienation."

The fallacy of this reasoning is, however, very obvious; the argument is founded altogether on a misconception of the nature of the trust for the separate use of a married woman. This trust does not give her an equitable estate with an appendant power of appointment or disposition; it gives her an equitable estate, to be held, enjoyed, or aliened, just as if she were a feme sole, and nothing more. The only effect of the trust for the separate use is to preclude the husband from interfering with the estate, and to make the wife the absolute owner of it. Nobody has ever thought of making a married woman convey by fine or acknowledged deed an estate settled to her separate use, where there is no restraint on anticipation; nor in any well-drawn conveyance is she made to appoint by virtue of an implied power of appointment. She simply conveys it by grant and release, or assignment, or such other appropriate form of assurance as she would convey by if she were a feme sole. The

of the settlement, the husband is only entitled in re-

remainder in tail or in fee to the son, it is usual, in the first instance, to limit to the son, during the joint

distinction between the express power of appointment, generally though uselessly given to a married woman immediately preceding the proper estate for her separate use, and that estate itself, is very clearly drawn by Sir Lancelot Shadwell in the recent case of *Barrymore* v. *Ellis*, (8 Sim. 1). Contrasting the two, he says, "Lady Barrymore had both a limited power of appointment, and the general uncontrolled dominion over the property." There was in that case a restriction on anticipation annexed to the express power, but this restriction was held to have nothing to do with that dominion or estate which the subsequent trust for her separate use gave her. And of course when the express power is wanting, she has the "general uncontrolled dominion," and that alone. It was this dominion or estate which Lord Thurlow declared was the creature of equity, and on the alienation of which he imposed his restriction. He was doubtless contrasting the interest created by the trust for the separate use, with a similar interest created for the benefit of any person not being a married woman, and on the ground that the former was a special creature of equity alone, he claimed a right to modify the right to alienate it. His assertion that he did not thereby take away any of the incidents of property at law was perfectly true, and of course pointed to the well-known fact, that a restriction on alienation cannot be imposed on a legal estate or on an equitable estate formed by strict analogy to a legal estate. There is no ground whatever for supposing that he meant to imply that the restriction he was imposing would be invalid in the case of real estate against the operation of a fine, for, as before observed, no one ever thought of a married woman's levying a fine to pass an estate settled to her separate use.

The Irish statute (4 & 5 Will. 4, c. 92), like the English statute referred to, gives a married woman power by an acknowledged deed to dispose of Irish real estate, but adds a proviso that "such powers of disposition shall not enable a married woman to dispose of lands or any estate therein, where the settlement or other instrument under which she may be entitled to the same shall contain a valid restriction against the anticipation thereof by such married wo-

lives of himself and his father, a rent-charge, with powers of distress and entry, to provide him with an immediate income, and subject thereto, and to any term which may be created for securing pin-money to the wife, and to any jointure rent-charge which may be limited to the wife, in case of the death of her husband in the lifetime of his father, to re-limit the estate to the father for his life by way of restoration of his previous life estate, and of all powers and authorities belonging thereto. The advantage of this is, that, though powers created by the new settlement would not overreach the terms of years, rent-charges, and other incumbrances created by the old settlement, prior to the estate of the son, yet the powers of the old settlement being preserved will overreach these incumbrances, and thus the estate can be leased, sold, or exchanged, as it might have been previously to the execution of the new settlement.

Remainder expectant on a life estate.

The next estates limited are an estate for life without impeachment of waste to the intended husband, with the usual remainder to trustees during his life,

Estate for life to the husband and to trustees to preserve contingent remainders.

man;" and it is argued that this is tantamount to a declaration by the legislature that the stat. 3 & 4 Will. 4, c. 74, which gives the power of disposition without the proviso, does enable a married woman by an acknowledged deed to dispose of lands or any estate therein, notwithstanding the settlement or other instrument under which she may be entitled does contain a restriction on anticipation. In discussing the principal question, however, the proviso in the Irish statute must be held to have been, as in fact it was, inserted "ex abundanti cautela," and cannot be allowed to have any weight one way or the other.

Jointure rent-charge to the wife, and term of years for securing it.

in trust for him, and to preserve the contingent remainders (*a*). These are followed by the limitation to the wife for her life, if she survive her husband, of a rent-charge for her jointure, and with powers of distress and entry (*b*) for enforcing payment of it, and a limitation to trustees for a term of years upon trusts for further securing the jointure (*c*). Frequently, instead of one jointure rent-charge, two or more are limited of different amounts, to take effect in different events, one, for example, to take effect on the death of the husband in the lifetime of his father, and the other on the death of the husband, after his father's death, or on the death of the father, if he survive the husband (*d*).

Term of years to raise portions for younger children.

The next limitation is of a term of years to trustees, in trust to raise, as portions for younger children, either a fixed sum, or a sum varying in amount according to the number of younger children (*e*). The trusts of the term are immediately followed by, or rather combined with, the trusts of the money to be raised, so as to make a complete settlement of it for the benefit of the younger children (*g*). And although, as a general rule, it is not intended that the portions

(*a*) Infra, vol. iv. pp. 501, 502.

(*b*) With respect to powers of distress and entry, see infra, vol. iv. p. 504, n. (*k*), p. 577, n. (*c*). See, too, *Saffery* v. *Elgood*, 1 Ad. & Ell. 161; S. C. 3 Nev. & Mann. 346; *Johnson* v. *Faulkner*, 2 Gale & Dav. 184.

(*c*) See the declaration of the trusts of such a term, infra, vol. iv. pp. 505—508.

(*d*) See infra, vol. iv. p. 502.

(*e*) Infra, vol. iv. pp. 505 and 511.

(*g*) Infra, vol. iv. p. 512 et seq.

shall be raised in the lifetime of the father, and the term is consequently limited only to commence from his death, yet it is highly desirable that a power should be given to raise them, with his consent, in his lifetime. In the absence of such a power, the object is generally attained by making the father join, and demise his life estate, but this mode is open to objection (*a*).

Limitations to the first and other sons of the marriage in tail.

Subject to the term for raising portions, the estate is limited to the first and other sons of the marriage successively, according to their respective seniorities in tail male, or tail general, and sometimes, though rarely, to the first and other daughters in the same way; and concludes with a limitation to the settlor in fee. If, indeed, the settlement is regarded not merely as a marriage settlement, but as a family settlement, or if it be not made on marriage, and be, in fact, merely a family settlement, then immediately after the limitation in tail to the sons, or to the sons and daughters of the first tenant for life, follow similar limitations for life and in tail to the other members of the family in succession, concluding, as before, with a limitation to the principal settlor in fee (*b*). In a marriage settlement, of course, no general power of appointment is given to the settlor or settlors, so as to overreach the limitations of the settlement; but, in a family settlement, the first limitation usually is of a general power of appointment to the settlor or

—in a family settlement not made on marriage.

(*a*) See a power for this purpose, infra, vol. iv. p. 518, and the note, p. 519.

(*b*) See infra, vol. iv. p. 610, n., and p. 614 et seq.

settlors, so as to place the estate completely in his or their power (*a*).

Trusts of the terms, shifting clauses, &c.

After the limitations are concluded, the trusts of the terms are declared according to their order of limitation, and then are inserted the shifting clauses and the powers to charge for general purposes (*b*).

Powers of jointuring and charging portions.

Powers for the husband to grant a jointure to any subsequent wife, and to charge portions for the children of a subsequent marriage, are often inserted in marriage settlements when the estates are of considerable value (*c*); and in settlements which contain limitations to successive tenants for life, powers for them to jointure and charge portions are usually inserted, with a proviso that the estate shall not be charged at one time with more than a specified amount (*d*). It is obvious, indeed, that such powers ought nearly always to be inserted, for in the absence of them, and of other means, the widow and children of a tenant for life would be left without any provision. The female tenants for life, too, when life estates are limited to females, should have powers of appointing rent-charges, in the nature of jointures, to their husbands, and of charging portions for their children (*e*).

Powers of leasing.

After the powers to charge come the powers for managing and dealing with the estate. The first of

(*a*) See infra, vol. iv. p. 613.

(*b*) Infra, vol. iv. pp. 617, 619, and the precedents of settlement by will in vol. v., particularly prec. xiv.

(*c*) Infra, vol. iv. pp. 520—524.

(*d*) Infra, vol. iv. pp. 620—623; and vol. v. pp. 211—217.

(*e*) Infra, vol. v. p. 136.

these are the powers of leasing, which are usually given to the tenant for life in possession, so long as there is one, and, during the minority of a tenant in tail, to the trustees to preserve contingent remainders. Every settlement should contain the ordinary power to lease for twenty-one years in possession at the best rent; but whether powers to grant building, repairing, and mining leases should be inserted, must depend on the nature of the property and the intention of the parties. If there be no instructions on the subject, they should not, generally speaking, be inserted by the draftsman of his own accord, unless it is evident from the papers before him, that the property is likely to be used for the purposes of building or mining; but in that case, he will find it most convenient to insert the powers, and call attention to them by a note in the margin of the draft (*a*).

Powers of enfranchisement, partition, &c.

In settlements of manors, powers of enfranchisement and of granting licenses to copyholders to demise and improve their tenements, should always be inserted; and in settlements of undivided shares, a power of partition is introduced as a matter of course. These powers are given to the trustees to preserve contingent remainders, with the condition, however, that they shall be exercised only with the consent of the tenant for life in possession, if there be one. The money paid for enfranchisements and

(*a*) See the forms of leasing powers, infra, vol. iv. pp. 524—533, and p. 624, vol. v. pp. 117—220, and p. 143. The cases and authorities with respect to powers of leasing are mentioned, infra, vol. iv. p. 531, n. (*a*), vol. iv. p. 533, n. (*b*).

for equality of partition, is directed to be held upon the same trusts as are afterwards declared of the money to arise under the power of sale and exchange, or, according to the most improved settlements, the monies to arise under all these powers are treated as a common fund, and the trusts of it declared after the power of sale and exchange (*a*).

Power of sale and exchange.

The last in order of place of the powers is the power of sale and exchange. Next to the power of leasing for twenty-one years, this is the most important power for the convenience of the estate, and should be inserted as a matter of course in every settlement. Not that it is intended that the whole or the bulk of the estate should be sold, (indeed trustees who should make such a sale without some sufficient motive would be guilty of a breach of trust (*b*)), but as it constantly happens that an estate can be improved by parting with some lands and acquiring others more convenient to be held with the bulk of the estate, a power to attain that object by means of sales and purchases or exchanges is of most essential use. It is, moreover, very often advantageous for an estate, that part of it should be sold, and the pur-

(*a*) The powers of enfranchisement, licensing, and partition in the precedents of settlements, vol. iv. pp. 533—539, and 625 et seq., are framed according to the old method, and in the latter case are blended together in a manner somewhat confused. The same power, coupled with the power of sale and exchange according to the new method, will be found in vol. v. p. 221 et seq. The principal authorities as to these powers are mentioned in the notes to the precedents referred to.

(*b*) 2 Sugd. Pow. 511 et seq. (6th edit.)

chase-money applied in the discharge of the incumbrances subsisting at the date of the settlement, or created by virtue of the powers contained in it, and modern settlements accordingly always contain a clause authorizing purchase-monies to be so applied (*a*). The power of sale and exchange is given to the trustees to preserve contingent remainders, with the condition that it shall be exercised during the life of a tenant for life in possession only with his consent. There can be no question that a mere power to sell or exchange will empower the donees of the power to do all acts necessary for effectuating a sale or exchange (*b*); but in modern settlements express powers to revoke the uses of the settlement and appoint to new uses are always inserted. The same observation applies to powers of enfranchisement, leasing, and all similar powers.

The power of sale and exchange is followed by directions that the money received on a sale, or for equality of exchange, or (where those powers have been inserted) on an enfranchisement or partition, shall be laid out in the purchase of lands, and that the lands so purchased shall be settled in the same manner as the lands originally comprised in the settlement (*c*). But a discretionary power is given to

(*a*) Infra, vol. iv. p. 545, vol. vi. p. 231.

(*b*) See 2 Sugd. Pow. 482, (6th edit.) In exercising a power of sale or exchange which prescribes no method of effectuating the object, the best way is to revoke the old, and appoint new, uses, as if there were an express power for that purpose.

(*c*) Vol. iv. p. 542 et seq.; and see, too, an improved form in a settlement by will, vol. v. p. 229 et seq.

the trustees, with the consent of the tenant for life (if any), to apply the money in the discharge of incumbrances (*a*); and also a power, until the money has been applied for one of the purposes before mentioned, to invest it in the public funds or on mortgage, the annual income to be received by the person for the time being entitled to the rents of the settled lands (*b*). After the powers of enfranchisement, partition, sale and exchange, and the like, is inserted a declaration that the receipts of the trustees, the donees of the powers, shall be sufficient discharges to purchasers and others paying money on the execution of any of the powers (*c*).

Power to appoint new trustees.

The last clauses in a settlement are those which provide for the appointment of new trustees in the place of those who die or go abroad, or are desirous of being discharged, or decline or refuse or become incapable to act in the trusts reposed in them. In settlements in which the husband and wife take successive life estates, this power is usually given to the husband and wife, and the survivor of them, and the executors and administrators of the survivor (*d*); but in settlements of the kind which we have been describing it is more difficult to determine in whom the power should be reposed. Perhaps the most satisfactory method is to give the power to the surviving or continuing trustees or trustee, or the executors or administrators of the last surviving or continuing

(*a*) Vol. iv. p. 545, and vol. v. p. 232.
p. 231.
(*b*) Vol. iv. p. 545, and vol. v. p. 231.
(*c*) Vol. v. p. 233.
(*d*) Vol. iv. p. 324.

trustee (*a*). Some practitioners, indeed, use a more elaborate form in settlements of the nature we have been describing, giving the power to different persons in respect of the different classes of trustees. Thus, the power to appoint new trustees of the term for securing the jointure rent-charge is given to the wife, or to the wife jointly with the husband, or some other person interested in the inheritance, while the power to appoint new trustees to preserve contingent remainders is given to the husband or his representatives, or to the continuing or surviving trustees or trustee, or the representatives of the last continuing or surviving trustee, with the concurrence of the husband during his life. In truth, however, the point is of very little practical importance—the only really important thing is to see that a sufficient power capable of being exercised in all ordinary events, is vested in some one. The danger of an improper appointment being made from the power being given to a wrong person is so slight that it need not be taken into consideration.

It must be borne in mind that the form of the power is different when there is only one set of trustees, and when there is more than one (*b*).

In the case of settlements of real estate, in which there are trustees to preserve contingent remainders, and who are also the donees of the powers, it is, perhaps, undesirable to depart from the ordinary form. But, in settlements of any other kind, the

(*a*) Vol. iii. p. 294.

(*b*) See the forms, vol. iv. p. 324, and p. 548. See, too, the note (*x*), p. 550.

introduction of a shorter form (*a*) is much to be recommended. There can be no question that the short form referred to is sufficient, and its language is more clear than the language of the ordinary form.

Clauses for the indemnity of trustees and the payment of their expenses.

The last clauses in a settlement are those for the indemnity of the trustees against involuntary losses, and for allowing them to retain and reimburse themselves their expenses (*b*). These clauses are always inserted in some form, and, generally, in the longest form; but it is clear that they express nothing more than the rule of courts of equity on the subject, and might, therefore, be safely omitted. As provisions of this nature, however, are looked for by trustees and their advisers, and the practice of inserting them is invariable, it will not be right to omit them altogether, but they may be very safely inserted in the very short form given at p. 329 of the fourth volume.

Covenants for title.

A settlement on marriage, or for other valuable consideration, and very often a voluntary settlement, contains the same covenants for title on the part of the settlor or settlors as a conveyance on a sale would contain, not only on account of the consideration for the settlement (when the settlement is for valuable consideration), but also that persons taking under the powers of sale and exchange, and other similar powers (who will get from the trustees

(*a*) Vol. iv. p. 328.

(*b*) Vol. iv. pp. 326—328; and the short form, p. 329.

only a covenant against their own incumbrances), may have the benefit of the ordinary covenants for title. In settlements of real estate they are generally placed at the end of the deed (*a*); in other settlements, in any place which may be convenient. When different interests are assigned by different persons by the same deed, the most convenient place for each person's covenants is, perhaps, immediately after his own assignment (*b*).

Personal settlements—ordinary provisions of.

The provisions of settlements of personal estate are very different from those of real estate. In ordinary marriage settlements of personalty, the income of the trust funds is given to the husband or wife for their joint lives, and, after the death of one of them, to the survivor, for his or her life; and, after the death of the survivor, the principal is directed to be divided among the children of the marriage, as the husband and wife shall jointly, by deed, appoint, and in default of and subject to such appointment as the survivor of them shall by deed or will appoint, and in default of and subject to any appointment under either of the preceding powers, then equally among the sons attaining twenty-one years, and daughters attaining twenty-one years or marrying. Clauses are added authorizing the trustees to advance a proportion (generally a half) of the expectant share of any son under twenty-one years of age, for his advancement in the world, and directing them, after the death of the husband and wife,

(*a*) Vol. iv. p. 552 et seq., and p. 353 et seq.
(*b*) See vol. iv. p. 409.

to apply the whole, or so much as they shall think fit, of the income of the expectant shares of any children who may not have attained vested interests for the maintenance and education of such children, and to accumulate the residue as an addition to the principal fund. A proviso is then added, disposing of the funds after the death of the husband and wife, if no child attains a vested interest. The usual practice is, to make the property which has proceeded from the husband revert to him on the death of his wife, and to make the property which has proceeded from the wife revert to her on the death of her husband, if she outlive him; and if she dies in his lifetime, then, on his death, to go to such persons as she may appoint by will; and, in default of appointment, to her own family, according to the statutes for the distribution of intestates' effects. The object of this latter provision is, to exclude the husband from taking the wife's property as her administrator, which he would do if it were given to her absolutely, and she died in his lifetime. The settlement is completed by the usual powers for the trustees to give receipts, for the appointment of new trustees, and for the indemnity of the trustees and the payment of their expenses. The first precedent of a settlement (*a*) is an exact specimen of the settlement above described.

Question, to whom the income should be given during

In arranging the terms of such a settlement as we have described, the first point is, to determine to

(*a*) Prec. i. vol. iv. p. 309.

whom the income should be given during the joint lives of the husband and wife. The income of the wife's property (and if the husband is in trade, so as to be subject to the bankrupt laws, or is not in affluent circumstances, the income of his property also) ought to be given during the joint lives to the separate use of the wife, and with a restriction on anticipation, so as to secure for her a certain and inalienable provision (*a*). The income of the husband's property, if he is not in trade and is in affluent circumstances, is usually given to him during the joint lives. And, indeed, in such case, the income of the wife's property also is often given to the husband, attended sometimes with a trust to pay an annual sum to the wife during the joint lives, by way of pin-money. Sometimes, also, the income of the wife's property, or of property settled by the husband in consideration of the wife's fortune being paid to him, is made payable to the husband, either during the joint lives, or, after the death of his wife during his own life if he survive her, subject to a provision for determining his interest on his bankruptcy or insolvency, or on his affecting to alienate

the joint lives of the husband and wife.

(*a*) See the form, infra, vol. iv. p. 316. See, too, the recent case of *Brown* v. *Bamford*, (11 Sim. 127), which suggests the propriety of placing the restriction on anticipation after the direction that the receipts of the wife shall be discharges, and of adding to the latter direction the words "and no other receipts," or the word "alone." See, too, the recent cases of *Simons* v. *Horwood*, 1 Keen, 7; *Laing* v. *Laing*, 10 Sim. 315; *Rycroft* v. *Christie*, 3 Beav. 238. See, too, the form of the trust for the separate use of a married woman, in the appendix to this book.

it (*a*). If this take place during the joint lives, the income is then given to the separate use of the wife, without power of anticipation. The right course, however, as before mentioned, is, in all cases, to give the whole income, when of moderate amount, to the wife for her separate use, and without power of anticipation.

Disposition of the wife's property in case of her dying in her husband's lifetime, and no child of the marriage attaining a vested interest.

The only other point on which dispute is apt to arise as to the terms of a personal settlement, is with respect to the destination of the wife's property in default or failure of children attaining a vested interest, and her own death in the lifetime of her husband. The ordinary and the right course, as before mentioned, is, to give the wife a power to dispose of it by will, and, in default of such disposition, to give it to her own family as if she had died unmarried and intestate. The power of disposition should be by will only, for, if it be by deed also, the wife will be liable (after it has become evident that there will be no child attaining a vested interest) to the importunity of her husband to make an irrevocable disposition in his favour. And she ought to have a power of disposition by will, because the object of the trust should be, to place her with respect to her own property as much in the situation of a feme sole as is duly compatible with the condition of a married woman. If she is not endued

(*a*) See, infra, vol. iv. p. 367, n. (*a*). See, too, the recent cases of *Godden* v. *Crowhurst*, 10 Sim. 642; *Rippon* v. *Norton*, 2 Beav. 63; *Corsbie* v. *Free*, 1 Cra. & Phill. 64; *Page* v. *Way*, 3 Beav. 20; *Twopenny* v. *Peyton*, 10 Sim. 487.

with this power, not only does she lose the influence which the possession of it may give her over her husband, but she is deprived of the power to bequeath the smallest legacy, and the fund is given over to relations whom she may not think fit objects, and divided among them in shares of which she may not approve. If, indeed, the property settled on her side emanates not from herself, but from her father or other relation, the case is somewhat different from that of her own absolute property. But, even in this case, it seems to be in the highest degree desirable that she should have the power to dispose of it by will; the possession of such a power may give her considerable influence over a husband insensible to better motives, and will, in all events, enable her to make such a disposition of the property as circumstances render desirable at her own death. The power, in this latter case, is sometimes given with a restriction to members of her own family as its objects. This, however, is not to be recommended, although better than the absolute exclusion of the power.

Similar disposition erroneous in the case of the wife surviving her husband.

The object of the power and trust we have been discussing seems very often to be misunderstood by solicitors. It is a thing of frequent occurrence to be instructed to make them apply whether the wife dies in her husband's lifetime or not. But this is a great mistake; their only object is, to exclude the husband surviving the wife from taking her property as her administrator. If he dies first, his right never comes into existence; and, on every principle of

justice and common sense, the wife's own property should be made to revert to her absolutely. If not, she is worse off than if she had not married, and is absolutely precluded from settling her property on a second marriage. Even if the property emanate not from her, but from her family, and they object to give it to her absolutely, still she should have a power to settle it on a subsequent marriage. Otherwise the property is completely tied up, and no irrevocable disposition of it can be made by the person for whom and whose children it was intended as a provision.

Settlement of property to be appointed to the settlor.

If a settlement is to be made of property to be appointed to the settlor, in pursuance of a particular and not a general power, the appointment should be made by a separate deed of even date, executed previously to the settlement. An appointment made in the settlement itself, by the direction of the settlor, might, indeed, be good (*a*) in equity, but would be very informal; the only proper and safe course is, to appoint to the settlor before the execution of the settlement, and make him or her convey or assign, by the settlement, to the intended trustees (*b*).

—of money secured on land, and of land to be treated as personalty.

When money secured on land is about to be settled, the money, and the land on which it is secured, should be vested in the trustees of the settlement by

(*a*) *Limbard* v. *Grote*, 1 My. & Kee. 1; *Thornton* v. *Bright*, 2 My. & Cra. 230; *Goldsmid* v. *Goldsmid*, 2 Hare, 1.

(*b*) See infra, vol. iv., SETTLEMENTS, Prec. ii. p. 330; and Prec. v. p. 356.

a separate deed, executed previously to the settlement (*a*). And the same observation applies to land which is not intended to be limited in strict settlement, but to be divided among the children as personal estate. Land intended to be so settled should be conveyed to the trustees in trust for sale (*b*), by a deed executed previously to the settlement.

Many points of practical importance in preparing settlements are discussed in the notes to the Precedents of Settlements (*c*); and the general law on the subject will be found in the authorities and cases there referred to. Reference to notes.

(*a*) See the reasons at length, vol. iv. p. 333, n. (*a*).

(*b*) See the observations, infra, vol. iv. p. 341, n. (*a*).

(*c*) Infra, vol. iv.

CHAPTER VII.

OF WILLS.

Treatises on the law of wills.

THE law, with respect to wills, is so extensive, and embraces so many points, that it is out of the question to give even the slightest sketch of it in a work of this description. This, however, is the less to be regretted, because it has been made the subject of several separate treatises of great merit, which are indispensable to the conveyancer, and are in the hands of every one (*a*).

Arrangement of the clauses of wills.

Several practical observations on framing wills are given in the notes to the precedents (*b*), and the following remarks on the arrangement of the different parts of wills will, it is hoped, be found useful to the draftsman.

Introductory and revocatory clause.

A will should commence with the name and description of the testator, coupled with a declaration that the present is his last will, and a revocation of all other wills. It was formerly the practice for the testator to direct the payment of his funeral and testamentary expenses, but this is incorrect. If he de-

(*a*) Powell on Devises, by Jarman; Bythewood's Conveyancing, by Jarman, vol. x.; Jarman on Wills; Williams on the Law of Executors and Administrators; and Roper on Legacies, are the principal works referred to.

(*b*) Vol. v.

sires to charge them on some particular fund, or on his real estate, he should do so expressly, and provide the requisite machinery for effectuating the intention; but if he means nothing more than that his funeral and testamentary expenses and debts should be paid out of his general personal estate, there is no occasion to direct this to be done, because it must be done by the general rule of law, whether the testator wills it or not.

Specific devises and legacies.

Immediately after the introductory clause should be placed the specific devises and bequests, i. e. the devises of specified real estate, and the bequests of specified chattels. This, however, does not universally apply to estates or chattels which it is intended to settle in strict settlement, and which it will often be found more convenient to place in a different part of the will.

Pecuniary legacies and annuities.

Next follow the pecuniary legacies and annuities; the simplest first. And here it may be well to remark, that when a specified sum of money is directed by the instructions (as is often the case) to be appropriated by the executors or trustees out of the money arising from the conversion into money of the testator's general residuary estate, and settled upon certain trusts, it will be found by far the most convenient plan to bequeath this sum of money independently as a legacy to the trustees, upon the trusts desired, and leave it to be satisfied out of the residuary estate, under the general directions to pay all legacies thereout. This not only makes the settlement of the legacy itself clearer, but prevents the

trusts of the residue from being embarrassed by special directions and declarations. The same observation holds good with respect to annuities; they should be given independently, and in declaring the trusts of the residue, there should be a general direction to appropriate sufficient funds to answer these annuities. By this means both the gift of the annuities and the trusts of the residue are more clear and distinct. Care should be taken that subject to the payment of the annuities, the appropriated funds shall again fall into the residue.

Devise of general real and personal estate to be converted into money.

The devise to trustees of the residuary real estate, or of any real estate which is intended to be sold and converted into money, will be next in order, followed by the appropriate trust for sale and conversion. Then will come the general bequest to the trustees of personal estate, followed by the proper direction for selling and converting into money such part of it as does not consist of money. And here it should be remarked that there is no occasion to exclude from the trust for conversion such stocks or funds as the testator may think fit to direct the residue to be be invested in, because the general direction to convert will not render it compulsory on, or even, perhaps, authorize, the trustees to convert funds which are not wanted for payment of funeral or testamentary expenses, debts, or legacies, and are of the kind in which the testator directs the residue to be invested. And it is obvious, that in directing payment of the funeral and testamentary expenses, debts, and legacies, and in disposing of any parts of the residue

which it is not intended to invest, it is much more convenient to treat the whole fund as money, than to treat it as a mixed fund of money and securities.

Trusts of the money to arise from such conversion.

The will proceeds to direct that out of the money produced by the sale of the real estate devised in trust for sale, and by the sale and conversion of such of the general personal estate as does not consist of money, and out of the testator's ready money, his trustees shall pay his funeral and testamentary expenses, debts, and legacies, and appropriate funds to satisfy any annuities he may have given, and then disposes of the ultimate residue either absolutely or upon trusts. The trusts (if there are any) will usually be to invest the fund, pay the income of it to some person or persons for life or a less period, and then divide the principal among children or other persons by name or as a class. This will usually require the addition of advancement, maintenance, and accumulation clauses as in an ordinary settlement of personalty.

Powers applicable to the real estate until sold.

A power or powers to lease the real estate until it is sold, and a direction that until a sale the rents shall be applied in the same manner as the income of the funds upon which the purchase-money is to be invested would be applied, usually succeed.

Devise of trust and mortgage estates, and appointment of guardians.

Then comes a devise of estates vested in the testator upon trusts or mortgage, and the appointment of guardians to his infant children, if he has any. It should be remembered, however, that the only person who can appoint guardians by will is the father of

the children (*a*),—a point which, in giving instructions, seems to be often overlooked.

Appointment of executors.

The next thing is to appoint the executors, and give them sufficient powers to arrange and settle accounts and disputed matters. It is a most essential point that the same persons, and those persons only, should be appointed executors, who are also made trustees of the residuary estate, because the duty of the executors is the same as that of the trustees, viz. to get in and convert the general personal estate, and pay the funeral and testamentary expenses, debts, and legacies. And it is obvious, that the testator should not affect to impose this duty, which the law imposes on the executors, on any other persons.

Trustee clauses.

Lastly are placed the power for the trustees to give receipts, the power to appoint new trustees, and the clauses for the indemnity of the trustees, and the re-imbursement of their expenses.

Reference to precedent.

The above is an outline of a will of the simplest and most ordinary description, and one of which an example will be afforded by the first precedent of wills (*b*). The other precedents in the fifth volume will furnish sufficient examples of more special and complicated wills.

Devise of real estate in strict settlement.

If there be a devise of real estate in strict settlement, this with all its powers and clauses may be inserted in any part of the will which is most convenient; but wherever it is inserted, it should be kept

(*a*) See vol. v. p. 14, n. (*v*). (*b*) Vol. v. p. 1.

quite distinct from the rest of the will, except in respect of the common trustee clauses which usually apply to the whole will.

Some observations with respect to the execution of wills will be found in vol. v. (*a*). Execution of wills.

(*a*) Page 19, notes (*aa*) and (*bb*).

CHAPTER VIII.

OF APPOINTMENTS OF NEW TRUSTEES.

References to the works on the subject.

THE law with respect to the appointments of new trustees is so fully explained in the works of Sir Edward Sugden and Mr. Chance on Powers (*a*), (one or both of which must be in the hands of every conveyancer), that it would be superfluous to introduce a treatise on the subject into the present work.

Vacancies should be filled up exactly, and not with a greater or less number of trustees than the number of vacancies.

Some points have already been briefly noticed in the notes to the precedents (*b*), but one of some practical importance in preparing appointments of new trustees may be adverted to here. It is this,—that under any ordinary power more trustees should never be appointed than there are vacant places among the original trustees (*c*), and that, if possible, all the vacancies which may exist should be filled up (*d*). The latter recommendation is, however, very often incapable of being fulfilled, because

(*a*) 2 Sugd. on Powers, ch. xix.; 2 Chance on Powers, ch. xix., and the Addendum to that Chapter in the Supplement. See, too, Lewin on Trusts, ch. xxiii. s. 2.

(*b*) See particularly vol. iv. p. 326, n. (*u*); vol. v. p. 261, and p. 264, n. (*e*).

(*c*) See 2 Chance on Powers, art. 2568; and Suppl. 2568 (*a*), 2568 (*b*).

(*d*) 2 Chance on Powers, art. 2569; and Suppl. 2569 (*a*), 2569 (*b*).

it is impossible to find a sufficient number of persons willing to accept the trust. Whenever this occurs, and an appointment of a new trustee or trustees is insisted on, the right way is to appoint the new trustee or trustees in the room of so many by name of the deceased or retired trustees, and not to make the appointment in the room of all the deceased or retired trustees without distinction. Unless the settlement is imperative, that the full number of the trustees shall always be filled up, it would be difficult to maintain that filling up one vacancy is a breach of trust, because others cannot be filled up. It is pretty clear, however, that two trustees retiring, or any other donees of a power to appoint new trustees, will not be allowed to appoint a single new trustee (*a*).

(*a*) *Hulme* v. *Hulme*, 2 My. & Kee. 682.

CHAPTER IX.

OF DISENTAILING DEEDS.

Mode of barring estates tail in freehold hereditaments.

ESTATES tail were formerly barred by fine or recovery, or, in some cases, by warranty; but since the act "For the Abolition of Fines and Recoveries, and for the Substitution of more simple modes of Assurance" (*a*), came into operation (1st January 1834), they can only be barred by deed enrolled in Chancery, according to the provisions of that statute (*b*). If the estate tail be in possession, or in reversion expectant only on an absolute estate or estates for years, the tenant in tail can, without the concurrence of any other person, absolutely bar the entail, and dispose of the fee-simple of the lands. But if there be a tenant in tail, and there be subsisting under the assurance by which the estate tail was created, any estate for years determinable on a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the tenant in tail must obtain the consent of the owner of the prior estate (who is called the protector) to enable him absolutely to bar the entail and dispose of the fee-simple of the lands. Without such consent, the tenant in tail can only bar the entail, and

(*a*) 3 & 4 Will. IV. c. 74. (*b*) See sects. 40 and 41.

dispose of the lands as against the persons claiming under his own estate tail, i. e. his own issue. And if he afterwards become tenant in tail in possession, or obtain the consent of the protector, he must execute a further assurance, enrolled according to the act, in order absolutely to bar the entail and dispose of the fee-simple. The act defines, with great particularity, who shall and who shall not be protector in several specified cases (*a*), and declares, that if there is more than one estate prior to the estate tail, the owner of the first of those estates is to be the protector (*b*). The protector must give his consent by deed, but he may do so either by a distinct deed, or by the deed by which the entail is barred (*c*). If his consent is given by a distinct deed, it must be enrolled in Chancery, either at or before the time when the deed to bar the entail is enrolled (*d*). And the deed to bar the entail must be enrolled within six calendar months from its execution (*e*).

—in copyhold hereditaments.

Before the passing of the statute, estates tail in copyholds were barred (according as the custom of the manor happened to be) by surrender, or by a customary recovery, or by forfeiture and re-grant (*g*). But, since the statute, legal estates tail in copyholds can be barred only by surrender, and equitable estates tail by surrender or deed (*h*). The provisions with respect to the protector apply to copy-

(*a*) Sects. 22—37.
(*b*) Sect. 22.
(*c*) Sects. 42—45.
(*d*) Sect. 46.
(*e*) Sect. 41.
(*g*) 5 Cru. Dig. by White, tit. xxxvii. ch. ii. p. 475.
(*h*) Sect. 50.

holds, and the consent of the protector may be given by deed entered on the court rolls of the manor, or personally to the person taking the surrender of the tenant in tail (*a*). If an equitable tenant in tail bar his entail by deed, such deed must be entered on the court rolls of the manor, but need not be enrolled (*b*).

—in money to be laid out in the purchase of lands.

The provisions of the statute are made to apply to lands to be sold, where the money arising from the sale is subject to be laid out in the purchase of other lands to be entailed, and also to money itself subject to be so laid out; but with the proviso, that, in the case of leaseholds for years subject to be so sold, and in the case of money itself, the disentailing assurance shall be an assignment by deed (*c*).

Irish act.

An act similar to the above has been passed in respect to Ireland (*d*).

Quasi estate tail.

The disentailing acts do not apply to the quasi estates tail created in leaseholds for lives or years. Such a quasi estate tail is, in reality, barred by the vesting of the interest, and the subject of it may be alienated by any mode applicable to such subject (*e*).

Decisions on the 3 & 4 Will. 4, c. 74.

The following are the principal decisions which have been made upon the act 3 & 4 Will. IV, c. 74:—

Infant tenant in tail may convey

It has been decided, that an infant tenant in tail

(*a*) Sects. 51, 52.

(*b*) Sects. 53, 54.

(*c*) Sect. 71. With respect to the law on this subject previously to the passing of the statute, see infra, vol. v. p. 325, n. (*a*).

(*d*) 4 & 5 Will. IV. c. 22. See infra, vol. v. p. 301.

(*e*) See Hargrave's note to Co. Litt. 20. a., n. 5. See, too, *Allen* v. *Allen*, 2 Dru. & Warr. 307.

may be ordered to convey under the statute, when a decree has been made for payment of debts under the act 1 Will. IV, c. 47, sect. 11 (*a*); as, before the statute, he might have been ordered to convey by means of a common recovery (*b*).

under the direction of the Court of Chancery.

The provision in the 18th section of the statute, exempting from its operation estates tail in lands in which the Crown has the reversion, applies only to estates tail granted as a reward for the services of the donees; thus it was held, that an estate tail, granted by King Charles II. to an illegitimate child, in consideration of love and affection, might be barred by an ordinary disentailing deed (*c*).

Entail of estates granted by the Crown for other considerations than services may be barred.

Several cases have arisen on the 33rd and 48th and 49th sections of the statute, which provide, that where the protector of a settlement is a lunatic, the Lord Chancellor, or other person entrusted with the care of lunatics, shall be the protector, and shall have power to consent to dispositions by the tenant in tail, and to make orders accordingly. It has been twice decided, that when a lunatic is tenant in tail in possession, with a remainder over to some other person in tail, the Chancellor is not protector of the latter estate tail so as to be enabled to consent to its being barred (*d*). And when the

Cases of lunatic protectors, and tenants in tail.

(*a*) *Radcliffe* v. *Eccles*, 1 Keen, 130.

(*b*) *Ex parte Johnson*, 3 Atk. 559.

(*c*) *The Duke of Grafton* v. *The London and Birmingham Railway Company*, 5 Bing. N.C. 27.

(*d*) *In the matter of Blewitt*, 3 My. & Kee. 250; *in the matter of Wood*, 3 My. & Cra. 266.

Chancellor is protector within the meaning of the act, it is not a matter of course for him to consent to the estate tail being barred. It seems that, generally speaking, the Chancellor will give his consent, if the object is to provide for the immediate family of the lunatic, but not if the object is only to give one collateral relation, or stranger, a benefit at the expense of another (*a*). And where the reversion in fee, expectant on the estate tail, belongs to the lunatic, the Chancellor will not consent to barring the estate tail (*b*). The 1 Will. IV, c. 65, authorizes the Lord Chancellor to direct the committee of the estate of a lunatic to make leases of the lunatic's estate; but this does not give the Chancellor power to direct leases, in the case of a lunatic tenant in tail, because the effect of such leases would be, to bar the estate tail pro tanto, which is not within the intent of the act of the 3 & 4 Will. IV, c. 74 (*c*).

Evidence of barring of entail in stock in the name of the Accountant-General.

When an estate in tail in possession in a sum of stock, in the name of the Accountant-General of the Court of Chancery, is barred in pursuance of the 71st section of the statute, an order for the sale of the stock, and payment of the money, will be made upon production of the disentailing deed, or an affidavit of the fact of the enrolment (*d*).

(*a*) *Grant* v. *Yea*, 3 My. & Kee. 245. *In the matter of Blewitt*, Id. 250. *In the matter of Newman*, 3 My. & Cra. 112.

(*b*) *In the matter of Wood*, 3 My. & Cra. 266.

(*c*) *In the matter of Starkie*, 3 My. & Ke. 247.

(*d*) *In the matter of Smythe*, 3 My. & Kee. 249.

Conveyances by married women take effect under the same statute as disentailing deeds, and it may be convenient to advert here to the decisions on the subject. The fees, regulations, and form of affidavit prescribed by the Court of Common Pleas in pursuance of the 76th and 89th sections of the statute will be found, 10 Bing. 458—462.

Conveyances by married women.

The affidavit of acknowledgment may be in a foreign language, and need not be signed by the deponent, provided that there be a proper affidavit by a competent person that such is the custom of the country (*a*). The affidavit of acknowledgment in a foreign country may be made by a notary public (*b*). And the affidavit may be before the British consul in a country in which the laws do not grant authority to any magistrate to administer an oath (*c*). But in Ireland, the affidavit must be made before a commissioner of the English Court of Common Pleas (*d*). The affidavit (or, in the case of a quaker, the affirmation) may be made by one of the commissioners who took the acknowledgment, provided he be a practising attorney, and have no interest in the affair (*e*).

Affidavit of acknowledgment.

If the married woman be an infant trustee conveying under the direction of the Court of Chancery,

Conveyance by an infant married woman, a trustee.

(*a*) *Ex parte Birch and Bell*, 4 Bing. N. C. 394.

(*b*) *Ex parte Mary Ann Mann*, 5 Bing. N. C. 226; *Pearsall* v. *Pearsall*, 1 Mann. & Grang. 973.

(*c*) *Davy* v. *Maltwood*, 2 Mann. & Grang. 424.

(*d*) *In the matter of Anderson*, 2 Bing. N. C. 435.

(*e*) *In the matter of Scholfield*, 3 Bing. N. C. 293.

the Court of Common Pleas will make an order authorizing the commissioners to take her acknowledgment without certifying that she is of full age (*a*).

Cases in which the concurrence of the husband will be dispensed with.

The 91st section of the statute authorizes the Court of Common Pleas to dispense with the concurrence of the husband, when he is living apart from his wife, and in several other cases. But when the court is asked to dispense with the concurrence of the husband on the ground of his living apart from his wife, there must be an affidavit by the wife negativing any communication with him (*b*). Copyhold property is within the meaning of the 91st section (*c*); but in the case referred to, the acknowledgment of the married woman seems to have been wholly unnecessary, as the property had been devised to the wife's separate use.

Commissioners' lien for fees.

Finally, it is to be observed, that commissioners taking the acknowledgment have a lien for their fees on the deed, certificate, &c. (*d*).

Question as to the effect of releases by tenants in tail and married women, referring to the Lease and Release Act.

A question it is said has been raised by some conveyancers (*e*), whether a tenant in tail can bar his estate tail by a release, executed in pursuance of the act (4 & 5 Vict. c. 21) for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties. The same question

(*a*) *In the matter of Luke*, 1 Bing. N. C. 265.

(*b*) *In re Mary Williams*, 1 Mann. & Grang. 881; *In re Anne Horsfall*, 3 Mann. & Grang. 132.

(*c*) *Ex parte Ann Shirley*, 5 Bing. N. C. 226.

(*d*) *Ex parte Grove*, 3 Bing. N. C. 304.

(*e*) See the Jurist of the 15th of April, 1843, No. 327.

has also been made as to a conveyance by a married woman, by an acknowledged deed. Who the conveyancers referred to are, or on what they found their opinions, has not been ascertained, but the objection is supposed to be that the act abolishing the lease for a year supplies only the execution of the lease for a year, and not the enrolment or acknowledgment of it. If this be the objection, it is sufficient to say that the lease for a year of a tenant in tail is good, without any reference to the statute, till it is avoided by the issue in tail, and need not therefore be enrolled to give it validity. And as the husband of a married woman always executes the lease for a year, and any assurance by him of his wife's estate is good for their joint lives, it is not necessary that the wife should even execute the lease for a year, much less acknowledge it. In either case the only use of the lease for a year is to create a temporary reversion, on which the release may operate; and there can be no question that this is accomplished without enrolling or acknowledging the lease for a year. The only reason that can be given for requiring a married woman to execute a lease for a year on a conveyance of her own estate, is, the possible chance that her marriage may not have been valid, and in that case she is a feme sole, and acknowledgment is out of the question.

However, the preferable and conclusive answer to this trivial objection is, that the Fines and Recoveries Act authorizes tenants in tail to convey by the same assurances as if they were tenants in fee simple; and married women by the same assurances as if they

were femes sole, subject only to enrolment in one case, and acknowledgment in the other. And now that the Lease and Release Act has empowered tenants in fee simple and femes sole to convey without a lease for a year, the operation of the former act by necessary implication dispenses with the lease for a year for tenants in tail, and married women. The only rational construction of the Fines and Recoveries Act is, that whatever assurance would, for the time being, be sufficient by a tenant in fee-simple, or a feme sole, will, at the same time, be sufficient by a tenant in tail, or a married woman.

The reader who may wish to see more on the subject is referred to the article in the Jurist (*a*); but the point is not worth attention, unless one of the opinions referred to should be met with in practice.

(*a*) Ubi supra.

CHAPTER X.

OF ANNUITY DEEDS.

Statutes relating to annuities.

GRANTS of life annuities are subject to several special restrictions imposed by statute. The principal statute at present in force is the 53 Geo. III., c. 141. The sections of it which are most important to conveyancers will be found in the note at the end of the chapter; and some account of them, and of the principal decisions, and the declaratory acts relating to them, is given in the following pages.

Practice of raising money by annuities now infrequent, and the substitutes for it.

It is, however, to be observed, that the practice of raising money by annuity has become very infrequent. The principal case in which it was employed was that of a tenant for life wishing to borrow money on the security of his estate; but in that case a much cheaper and safer method is now used. The tenant for life mortgages his life-estate, (usually by demise), insures his life, and charges the premiums of the insurance on the estate (*a*). Supposing the income of the estate to be sufficient to pay the interest and premium, the only risk for the mortgagee is, that the mortgagor may do some act to vitiate

(*a*) See the precedent of such a mortgage in the Appendix to this book.

the policy; but if the policy be effected (as it ought to be) in the name of the mortgagee, the risk of this is not considerable. Another case in which money was raised by way of annuity was that of the owner of a reversion wishing to borrow money. The practice was for him to grant a deferred annuity, to commence from the death of the owner of the prior estate. This, however, is now frequently effected by means of a mortgage, and the investment in the names of the trustees of a sum of money or stock to answer the interest on the mortgage. A declaration of trust of stock so invested, and some notice of the objections to it, have already appeared in this work (*a*). The law with regard to annuities will, however, be treated somewhat fully in comparison with some other subjects, because the works devoted to the subject are not in the hands of the generality of practitioners.

Memorial of every instrument for securing an annuity to be enrolled in Chancery within thirty days after execution.

The second section of the statute provides, that, within thirty days after the execution of any instrument granting an annuity for life or lives, or for an estate determinable on a life or lives, a memorial of the date of such instrument, of the names of the parties and witnesses, of the person or persons for whose life or lives the annuity is granted, of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in

(*a*) Vol. V. prec. lxxxix. p. 626, n. (*a*).

Chancery, in the form, or as nearly as possible, in the form prescribed by the act (*a*). By the act of the 3 Geo. IV., c. 92, it is, however, provided, that, if an annuity is secured by more than one instrument, any instrument of which a memorial is duly enrolled shall be valid, notwithstanding the omission to enrol any other instrument.

Thirty days, how to be computed.

The period of thirty days from the execution, allowed for enrolling the memorial, is exclusive of the day of execution (*b*); and by the day of execution is meant the day on which it is executed by the first person executing it, and not the day of execution by the grantor (*c*). Indeed, it is not necessary that an annuity deed should be executed by every grantor before the enrolment (*d*). But if a person executes after the memorial is enrolled, he should do so in the presence of some person or persons already a witness or witnesses to the deed, and whose names are consequently already on the memorial, or without any attesting witness at all. One of these modes must be adopted when any party is so far from England that a memorial cannot be enrolled within thirty days after his execution.

Contents of the memorial —nature of the instrument securing the annuity.

A column of the memorial is to be filled up with the nature of the instrument, but no great accuracy seems to be essential. Thus, an under-lease for the

(*a*) See infra, vol. v. p. 346.

(*b*) *Ex parte Fallon and Wife*, 5 T. R. 282; a case under a prior act.

(*c*) *Buckeridge* v. *Flight*, 6 B. & C. 49; S. C., 9 Dowl. & Ry. 113; affirming *Flight* v. *Buckeridge*, 3 Bing. 323.

(*d*) Id.

whole term, less ten days, was held to be sufficiently described as an assignment (*a*). And the mere expression "grant of annuity" has been deemed a sufficient description of such a grant, although it contained collateral matters (*b*). Of course, however, the nature of the instrument should be stated as accurately as possible.

Names of witnesses.

If persons are named in the memorial as witnesses to the instrument whose names are not signed to it as witnesses, the annuity will be void, and that, although the name of the actual witness is given in the memorial (*c*). By the act of the 3 Geo. IV., c. 92, it is declared that no further description of the witnesses is necessary than their names; and by the further explanatory act of the 7 Geo. IV., c. 75, it is declared that the names of the witnesses need not be stated further or otherwise in the memorial than they appear signed to the attestation of the instrument granting the annuity. This last provision was to remove a doubt whether the witnesses' names must not be given at length, although the initials only were signed to the instrument.

Names of cestui que vies.

It is sufficient in the memorial, in stating the persons for whose life or lives the annuity is granted, to give their names alone, without description and without any explanation whether the annuity is for their joint lives only, or for their joint lives and the

(*a*) *Capel* v. *Butler*, 2 B. & C. 251; S. C., 3 Dowl. & Ry. 485.

(*b*) *Crowther* v. *Wentworth*, 6 B. & C. 366; *Browne* v. *Lee*, 6 B. & C. 688.

(*c*) *Gibbs* v. *Hooper*, 9 Sim. 89.

lives and life of the survivors and survivor, or otherwise (*a*). And a mistake in the name of a cestui que vie, if the name is the same in the annuity-deed and in the memorial, is immaterial (*b*).

Consideration.

If the consideration is the consideration not for the annuity alone, but for some other benefit, (as for the purchase of policies of assurance on the life of the grantor), this need not be stated in the memorisl (*c*). Nor need a covenant by the grantee to pay an annual premium on a policy of assurance on the grantor's life be mentioned as a consideration in the memorial, although the amount of such premium has been added to, and forms part of, the annuity (*d*). And although the instrument state the consideration to have been paid in notes and sovereigns, and the memorial in notes only, which was the fact, this is unimportant, because the statement in the deed is mere surplusage (*e*). The memorial, however, must be correct in this point, or the annuity will be set aside (*g*). Where the memorial set out the deed by way of recital, and in that recital mentioned a sum as the consideration, and afterwards stated the consideration paid as a different sum, the memorial was held not to contain a true statement of the consideration, and the grant of the annuity, as well as a warrant of

(*a*) *Barber* v. *Gamson*, 4 B. & Ald. 281.

(*b*) *Hulton* v. *Sandys*, 1 Younge, 602.

(*c*) *Morris* v. *Jones*, 2 B. & C. 232.

(*d*) *Faircloth* v. *Gurney*, 9 Bing. 622.

(*e*) Id.

(*g*) *Ex parte Lewis*, 2 Ad. & Ell. 135.

attorney given for securing it, were held to be void (*a*).

What the memorial need not state.

The memorial need not state that the annuity is redeemable, nor the name of the party in whose favour the warrant of attorney is given (*b*), nor for what penal sum the warrant of attorney authorizes a confession of judgment (*c*). And no memorial is required of further securities which formed no part of the agreement on the grant of the annuity, and are in fact given subsequently (*d*).

Persons beneficially interested in the annuity to be named in the deed and memorial.

The 4th section of the act requires that, if the grantee of the annuity is not the person beneficially entitled to it, the name of such person shall be stated in the instrument granting the annuity, as well as in the memorial.

Return or retainer of any part of the consideration renders the annuity liable to be set aside.

The 6th section provides, that, if any part of the consideration is returned or retained, or not fairly paid as expressed, the court in which there is any action or judgment for the annuity may set it aside, and cancel and vacate the securities. The cases on this section are very numerous (*e*), but the practical

(*a*) *Gibbs* v. *Hooper*, 9 Sim. 89.

(*b*) *Yems* v. *Smith*, 8 B. & Ald. 206.

(*c*) *Barber* v. *Gamson*, 4 B. & Ald. 281.

(*d*) *Ex parte Price*, 3 Madd. 132; *Aston* v. *Gwinnell*, 3 You. & Jerv. 136. See, however, *Earle* v. *Browne*, 2 Per. & Dav. 393.

(*e*) The following are some of the principal:—*Mence* v. *Hammond*, 6 Moore, 491; *Mootham* v. *How*, 7 Taunt. 596; *Barber* v. *Gamson*, 4 B. & Ald. 281; *Girdlestone* v. *Allan*, 1 B. & C. 61, 2 Dow. & Ry. 150; *Jones* v. *Silberschildt*, 4 Bing. 26; S. C. nomine *Chappell* v. *Silberchild*, 12 Moore, 113; *Finley* v. *Gardner*, 6 B. & C. 165; S. C., 9 Dow. & Ry. 207; *Gorton* v. *Champneys*, 1 Bing. 287; S. C.,

result may be shortly stated, viz. that the whole consideration must be actually paid to the grantor or to some agent of his who is not connected with the grantee, and that the consideration must be paid by the grantee himself, or by an agent of his not connected with the grantor. The costs of preparing the securities are, indeed, paid by the grantor, but they must not be retained out of the consideration; a bill should be regularly made out and delivered to the grantor, and paid by him after he has received the consideration (*a*). The money may, however, be paid to a trustee for the grantor, to be by him applied in payment of the costs of the annuity-deeds and of debts due by the grantor to judgment creditors, and the surplus only to be for the grantor (*b*).

The consideration need not be money actually paid.

It is not necessary, however, that money should be actually paid as the consideration for an annuity; a debt previously due by the grantor to the grantee is sufficient, and the grantee's retaining the security for the debt will not avoid the annuity (*c*).

Contracts by infants for the purchase of annuities void, and incapable of being confirmed.

The 8th section of the statute renders void all contracts for the purchase of annuities by persons under the age of twenty-one years, and all attempts to confirm the same after the purchaser has attained twenty-one. But where an infant and an adult per-

8 Moore, 302; *Williamson* v. *Goold*, 1 Bing. 234; S. C., 8 Moore, 109; *Calton* v. *Porter*, 2 Bing. 370; S. C., 9 Moore, 703.

(*a*) *Mouys* v. *Leake*, 8 T. R. 411; *Hurd* v. *Girdlestone*, 1 Marsh. 407; S. C., 4 Taunt. 8.

(*b*) *Aston* v. *Gwinnell*, 3 You. & Jerv. 136.

(*c*) *Cook* v. *Tower*, 1 Taunt. 372.

son covenanted jointly and severally for payment of an annuity, it was held that the contract might be enforced against the adult (*a*).

Annuities excepted from the provisions of the act.

The section of the act which is perhaps now the most important to conveyancers is the 10th, which exempts certain kinds of annuities from the operation of the act. For the granting and securing annuities which are not within the intention of the act is now a much more common operation than the preparation of a regular annuity-deed and memorial.

—those given by will or marriage settlement, or for the advancement of a child.

The first exception in the act is of an annuity given by will or marriage settlement, or for the advancement of a child; on this, it is believed, no cases have arisen.

—those secured on estates of inheritance in possession of adequate value.

The next exception is of an annuity secured upon an estate of inheritance in possession in freehold, copyhold, or customary land of equal or greater value than the annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant. The "other annuity" intended by the act must be actually charged on the lands, and not merely secured by judgment (*b*). But whether, since the act 1 & 2 Vict. c. 110 (*c*), a judgment would not constitute a specific charge on the estate, within the meaning of the act, may be a question. It is immaterial whether the estate of inhe-

(*a*) *Gillow* v. *Lillie*, 1 Bing. N. C. 695; S. C., 1 Scott, 597.

(*b*) *Walford* v. *Marchant*, 2 B. & Adol. 315.

(*c*) Sect. 113. See infra, vol. iii. p. 228, n. (*i*).

ritance be legal or equitable; thus, an equity of redemption is sufficient (*a*). And it is sufficient if the grantors have among them an estate of inheritance in possession. Thus, where there was a devise in trust for a woman for life, and, after her decease, for all her children in fee, and she and three of her six children joined in charging an annuity on three-sixths of the estate, it was held that no memorial of the deed need be enrolled (*b*).

Where an annuity was granted jointly by a principal and surety, and the annuity was secured on sufficient real estate of the surety, it was held to be within the exception, and not to require enrolment (*c*). And, of course, the addition of other security, as of leasehold property, will not render it necessary to enrol the security (*d*). And where an annuity was granted by a father and son who had a joint power of appointment over a freehold estate, and who in exercise of that power charged the annuity on the estate, no enrolment was required (*e*).

—those secured by the actual transfer of stock.

The act also excepts annuities "secured by the *actual transfer* of stock in any of the public funds,

(*a*) *Amhurst* v. *Skynner*, 12 East, 263; *Tucker* v. *Thurstan*, 17 Ves. 131; *Shrapnel* v. *Vernon*, 2 Bro. C. C. 268; *Cumming* v. *Twysden*, 12 East, 272, n.—cases on the old act.

(*b*) *Walford* v. *Marchant*, 3 My. & Cra. 550.

(*c*) *Darwin* v. *Lincoln*, 5 B. & Ald. 444.

(*d*) *Ex parte Mickell*, 2 East, 137, under the old act. A rent-charge, it may be observed, granted by a tenant for years, is not void, but is a good chattel interest. *Butt's Case*, 7 Rep. 23 a; *Saffery* v. *Elgood*, 1 Ad. & Ell. 191; S. C., 3 Nev. & Man. 346.

(*e*) *Halsey* v. *Hales*, 7 T. R. 194.

the dividends whereof are of equal or greater value than the annuity." But if a tenant for life grants an annuity, and directs the payment of it out of the dividends, this is not within the exception, and requires enrolment (*a*). And where a tenant for life assigned 150*l.*, part of the dividends, but provided that the purchaser should not receive any part of the dividends then due, but a proportionable part of the 150*l.*, it was held that the annuity must be enrolled (*b*).

—those not granted for the purpose of raising money.

The last exception in the act relating to ordinary annuities is of "any voluntary annuity granted without regard to pecuniary consideration." In the old act (17 Geo. III, c. 36), the words "money's worth" were not found; and, therefore, where nothing was paid, it was unnecessary to enrol a memorial. Thus, the grantee giving up a business (*c*), or stock in trade (*d*), or assigning a reversionary interest in stock (*e*), or the dividends of stock (*g*), did not require

(*a*) *Hudson* v. *Skinner*, 6 T. R. 596; *Hood* v. *Burlton*, 4 Bro. C. C. 121; S. C., 2 Ves. jun. 29; *Duff* v. *Atkinson*, 8 Ves. 577; *Dupuis* v. *Edwards*, 18 Ves. 358; *Cumberland* v. *Kelley*, 3 B. & Ad. 602, all under the old act.

(*b*) *Charretie* v. *Vause*, 1 Sim. 153; where, however, the whole of the grantor's life-interest in the dividends of stock was sold, and assigned in consideration of an annuity for his life, no memorial, under the old act, was needed of the instrument securing the annuity. *Browne* v. *Like*, 14 Ves. 302.

(*c*) *Crespigney* v. *Wittenoon*, 4 T. R. 790; *Hutton* v. *Lewis*, 5 T. R. 639.

(*d*) Id.; and *Doe d. Johnstone* v. *Phillips*, 1 Taunt. 356; *Hick* v. *Keats*, 4 B. & C. 69; S. C., 6 Dav. & Ry. 68; S. C. nom. *Keats* v. *Hick*, 5 Moore, 629.

(*e*) *Brown* v. *Dowthwaite*, 1 Madd. 446.

(*g*) *Browne* v. *Like*, 14 Ves. 302; *James* v. *James*, 2 Brod. & Bing. 702; S. C., 5 Moore, 479.

enrolment; and the addition of the words "money's worth" does not appear to have made a very great alteration in the law. It has been decided, upon the existing act, that an annuity is within the act so as to require enrolment only when there is an actual sale of the annuity for money, bills, or goods; and that an annuity granted as the purchase-money or consideration for an estate, or as part of a family arrangement, is not within the act. Thus, where an annuity was granted as the consideration for the grantee's giving up her life interest in certain veins of coal to the grantors, no enrolment was required (*a*); and a bond to secure an annuity, part of the consideration for the purchase of a house and land, was held not to require enrolment (*a*). And where a man secured a debt due from his father, in consideration of an annuity secured to him by the bond of his father's executors, the bond was not deemed to need enrolment (*b*). So, too, in the case of a bond given to receive an annuity to the obligor's father and mother for their lives, in consideration of their giving up a farm and farming stock (*c*). And where A., being indebted to B., agreed, in lieu of paying the debt, to secure an annuity to B.'s widow after his decease, during the joint lives of A. and the widow,

(*a*) *Mestayer* v. *Biggs*, 1 Cro. Mee & Ros. 110. See, too, *Browne* v. *Like*, 14 Ves. 302, where the dividends of stock were sold and assigned, in consideration of an annuity.

(*b*) *Blake* v. *Attersoll*, 2 B. & C. 875; S. C., 4 Dow. & Ry. 479.

(*c*) *Tetley* v. *Tetley*, 4 Bing. 214; S. C., 12 Moore, 441.

and three years after B.'s death A. executed an annuity deed in pursuance of the agreement, no memorial was held necessary (*a*).

In a recent case, an attempt was made to maintain that an annuity deed executed in consideration of a former annuity given up, and containing a covenant not to redeem for five years, did not require enrolment, but this was overruled (*b*).

Assignments of annuities not within the act.

The assignment of an annuity does not require to be enrolled (*c*).

The Annuity Act, 53 *Geo. III., c.* 141.

Sect. 2. And be it further enacted, that within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of years, or greater estate, determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require: otherwise every such deed, bond, instrument, or other assurance shall be null and void to all intents and purposes.

(*a*) *Frost* v. *Frost*, 3 B. & Ad. 612.

(*b*) *Earle* v. *Browne*, 2 Per. & Dav. 393.

(*c*) *Dixon* v. *Birch*, 2 H. Blackst. 307; *Bromley* v. *Greathead*, Ib.; *Henderson* v. *Glencairn*, 2 Taunt. 235; See, however, *Duke of Bolton* v. *Williams*, 2 Ves. jun. 138; S. C., 4 Bro. C. C. 297.

Sect. 3. Provided always, and be it further enacted, that if any such annuity shall be granted by, or to, or for the benefit of any company, exceeding in number ten persons, which company shall be formed for the purpose of granting or purchasing annuities, it shall be sufficient in any such memorial to describe such company by the usual firm or name of trade.

Sect. 4. And be it further enacted, that in every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall, from and after the passing of this act, be granted, or attempted to be granted, for one or more life or lives, or for any term of years, or greater estate, determinable on one or more life or lives, where the person or persons to whom such annuity shall be granted or secured to be paid, shall not be entitled thereto beneficially, the name or names of the person or persons who is or are intended to take the annuity beneficially shall be described in such or the like manner as is hereinbefore required in the enrolment, otherwise every such deed, instrument, or other assurance shall be null and void.

Sect. 6. And be it further enacted, that if any part of the consideration for the purchase of any such annuity or rent-charge shall be returned to the person advancing the same, or in case such consideration, or any part of it, shall be paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid, or if such consideration is expressed to be paid in money, but the same or any part of it shall be paid in goods, or if the consideration, or any part of it, shall be retained, on pretence of answering the future payments of the annuity or rent-charge, or any other pretence, in all and every the aforesaid cases, it shall be lawful for the person by whom the annuity or rent-charge is made payable, or whose property is liable to be charged or affected thereby, to apply to the court in which any action shall be brought for payment of the annuity or rent-charge, or judgment entered by motion, to stay proceedings on the action or judgment; and if it shall appear to the court, that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the court to order every deed, bond, instrument, or other assurance, whereby the annuity or rent-charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated.

Sect. 8. And be it further enacted, that all contracts for the purchase of any annuity or rent-charge with any person, being under the age of twenty-one years, shall be and remain utterly void, any attempt to confirm the same, after such person shall have attained the age of twenty-one years, notwithstanding.

Sect. 10. And be it further enacted, that this act shall not extend to Scotland or Ireland, nor to any annuity or rent-charge given by will, or by marriage settlement, or for the advancement of a child, nor to any annuity or rent-charge secured upon freehold, or copyhold, or customary lands in Great Britain or Ireland, or in any of his Majesty's possessions beyond the seas, of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice, at the time of the grant, whereof the grantor is seised in fee-simple, or fee-tail in possession, or the fee-simple whereof in possession the grantor is enabled to charge, at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity, nor to any voluntary annuity or rent-charge granted without regard to pecuniary consideration or money's worth, nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of Parliament.

CHAPTER XI.

OF COPARTNERSHIP DEEDS.

In the introductory note to the precedents of co-partnership deeds (*a*), a reference is made to this chapter as containing some observations on the law of partnership, so far as it relates to the construction of partnerthip deeds. But on reconsideration, it has been found that nothing of material value could be added to the suggestions in the short notes to the precedents, unless a complete treatise on the subject were introduced, which would of course be inconsistent with the nature and limits of the present work. The reader is therefore referred to Collyer on the Law of Partnership, particularly pp. 131—161, (2nd edit.), and Story's Commentaries on the Law of Partnership, ch. x., p. 284.

(*a*) Infra, vol. v. p. 369.

CHAPTER XII.

OF COMPOSITION DEEDS.

THE intended observations on this subject (*a*) are omitted for the reason assigned in the last chapter. The work of Mr. Forsyth, referred to in the introductory note to the precedents of composition deeds (*b*), is very compendious, and contains sufficient information on the subject. See, too, the notes to the precedents of composition deeds.

(*a*) See infra, vol. v. p. 427. (*b*) Id.

CHAPTER XIII.

OF RELEASES.

A RELEASE is the giving or discharging of the right or action which a man hath, or may have, or claim against another man, or that which is his (*a*); or it is when a man quits or renounces that which he had before (*b*), or, in other words, gives up some claim or demand. It may be either by express words or by operation of law (*c*); but it is intended in the following pages to treat only of releases by express words, or such releases as it is the business of the conveyancer to prepare. Definitions of releases.

A release generally speaking is given by deed. A release of a right arising from an instrument under seal (as from a covenant) is not valid except when given by deed (*d*), nor a release of any right of action which has actually accrued (*e*). And although in equity a release of claims by signing an approval of a stated account, or the like, would, it is appre- A release should be by deed.

(*a*) Shepp. Touchst. ch. xix. p. 320.

(*b*) Comyns's Dig. Release, (A. 1). These definitions do not apply, and are not intended to apply, to a release operating as a conveyance, see supra, p. 387.

(*c*) Co. Litt. 264. b.

(*d*) *Rogers* v. *Payne*, 1 Wils. 376; 6 Rep. 44 a: *Blake's case.*

(*e*) *Langdon* v. *Stokes*, Cro. Car. 383.

hended, be equally efficacious with a formal release, yet the uniform practice is in all cases to require a release under seal. In pleading a release in equity, it is, however, sufficient to state that it was "sealed and delivered," without also saying that it was signed (*a*). Releases of claims are commonly made by deed-poll, but there is no objection to their being given by indenture, when circumstances render that form convenient. Perhaps, when covenants and provisoes are intended to be inserted, an indenture is more appropriate than a deed-poll.

Words of release.

The ordinary words of release when applied to the estate are "remise, release, and quit claim;" when applied to the person, "acquit, release, and discharge;" but any words which sufficiently indicate the intention to discharge the claim are a sufficient release (*b*).

Covenant not to sue—when it amounts to a release.

A general covenant not to sue for a debt is a release of the debt, for otherwise there would be two actions, one for the debt and the other upon the covenant not to sue for it, in which it would again be recovered by the debtor (*c*). A covenant, however, not to sue for a debt for a certain time is not a release (*d*). If, however, there be a covenant not to sue for a time certain, coupled with an agreement in

(*a*) *Taunton* v. *Pepler*, 6 Madd. 166.

(*b*) Infra, vol. v. p. 479.

(*c*) Com. Dig., Release, (A. 1).

(*d*) Id.; *Ayloffe* v. *Scrimshire*, Carth. 63; S. C., 1 Show. 46; Comb. 123; 2 Salk. 573: *Thimbleby* v. *Barron*, 3 Mee. & Wels. 210, and the cases there cited, p. 216, n. (*e*). See, too, *Lancaster* v. *Harrison*, 6 Bing. 725; S. C., 4 Moo. & Pay. 561.

the deed that such covenant shall be a release; this amounts to a release (*a*). And where there was an indorsement upon a bond, executed cotemporaneously with the bond, that no action should be brought on it till the death of the obligor, this was held to be part of the condition of the bond (*b*.)

Where one of several co-claimants may release.

One of several executors or administrators may release a debt owing to the testator or intestate (*c*). And one of several co-plaintiffs may release the cause of action (*d*). In the latter case, however, if the release be improperly given, the court will set it aside (*e*), but not, it would seem, in the case of executors (*g*). So, too, one of several partners may release a debt owing to the firm (*h*). But a covenant not to sue, entered into by one of several partners, cannot be pleaded as a release. A husband may release a debt owing to his wife before marriage (*i*); but where a wife, separated from her husband, commenced an action as executrix in the names of her-

Who may release in certain other cases.

(*a*) Com. Dig., Release, (A. 1).

(*b*) *Burgh* v. *Preston*, 8 T. R. 483. See, too, *Broke* v. *Smith*, Moore, 679; *Morley* v. *Freer*, 6 Bing. 547; S. C., 4 Moo. & Pay. 305; *Norton* v. *Wood*, 1 Russ. & My. 178.

(*c*) 2 Williams on Executors, part iii. book i. ch. ii. pp. 620, 622, (1st edit.); *Jacomb* v. *Harwood*, 2 Ves. sen. 67.

(*d*) *Acton* v. *Booth*, 4 Moore, 192; *Furnival* v. *Weston*, 7 Moore, 356.

(*e*) *Barker* v. *Richardson*, 1 You. & Jer. 362; *Jones* v. *Herbert*, 7 Taunt. 421; *Mountstephens* v. *Brooke*, 1 Chit. 390.

(*g*) *Anon.*, 1 Chitt. 391, n.; *Herbert* v. *Piggott*, 2 Dowl. P. C. 392.

(*h*) Coll. Law of Partnership, 291, (2nd edit.); *Walmsley* v. *Cooper*, 3 Per. & Dav. 149.

(*i*) *Miles* v. *Williams*, 1 P. Wms. 249.

self and her husband, and the husband released the debt, such release was set aside (*a*). A fraudulent release by a trustee will be set aside even at law (*b*). The obligee of a bond cannot effectually release the debt, after having assigned it (*c*). And the same rule will, it is apprehended, apply to other debts as well as bond debts. The rule would doubtless be applied to the case of a covenant running with the land after a conveyance of the land (*d*), although in an old case some question seems to have been made (*e*).

Releases extend only to matters of which the releasors were conusant.

Releases given by persons not conusant of their rights, or extending to matters not contemplated by the releasors are of no avail, so far as relates to such rights or matters (*f*). And a release cannot in equity be pleaded to a bill impeaching the fairness of the dealings and accounts upon which it was founded (*g*). This shews the great importance of stating all the transactions in respect of which the release is given fully on the face of the release; and if the pecuniary transactions cannot be embodied in the release, they must be stated in an account, which must be examined and signed, and which, if convenient, may be appended to the release. If, as often happens in old

(*a*) *Innell* v. *Newman*, 4 B. & Ald. 419.

(*b*) *Manning* v. *Cox*, 7 Moore, 617.

(*c*) *Legh* v. *Legh*, 1 Bos. & Pull. 447.

(*d*) See *Roe* d. *Bamford* v. *Hayley*, 12 East, 464.

(*e*) *Middlemore* v. *Goodall*, Cro. Car. 503.

(*f*) Infra, vol. v. p. 473. See, too, *Minger* v. *Kett*, 12 Mod. 558; *Gee* v. *Spencer*, 1 Vern. 32; *Pascoe* v. *Pascoe*, 2 Cox, 109; *Salkeld* v. *Vernon*, 1 Eden, 64; *Harvey* v. *Cooke*, 4 Russ. 34.

(*g*) *Roche* v. *Morgell*, 2 Scho. & Lef. 721.

trusts, it is impossible to supply an account of all the dealings with the trust funds, the release, after enumerating the funds then in the hands of the trustees, should state that an account of the dealings with the funds cannot be made out, but that the releasors are content to take the funds as they stand, and release all claims without requiring any further account.

Extent of the operation of a release.

It is perfectly established that the general words of a release will not carry its operation further than the intention of the parties indicated by the recitals or otherwise on the face of the release (*a*); but it is said that if the releasor has demands in different capacities, (as, for example, in his own right, and as executor of another), the release, unless expressly restrained, will extend to all the demands, and not merely to those in his own right (*b*). This, indeed, is doubtful (*c*), but it, at any rate, shews the necessity of shewing, by the recitals and otherwise, beyond a possibility of dispute, what demands, or in what capacity, the releasor means to release, or whether he means to give an absolute and unrestricted release extending to all demands.

When a release enures to the benefit of a person not a party to it.

A release made by indenture between parties cannot be taken advantage of by a person who was not, and does not claim through, a party to the deed, although it does not appear that the same doctrine holds in respect of releases by deeds-poll (*d*). A re-

(*a*) Infra, vol. v. p. 473.

(*b*) Shepp. Touchst. 345.

(*c*) See *Knight* v. *Cole*, 120; S. C., 3 Lev. 274; *Hutchinson* v. *Savage*, 2 Ld. Raym. 1306.

(*d*) *Storer* v. *Gordon*, 3 Mau. & Sel. 308; *Gardner* v. *Lachlan*, 8 Sim. 123; S. C., 4 My. & Cra. 129.

lease to two persons extends to all causes of action against them jointly and severally (*a*). And a release to one of several co-debtors extends to all, and that, though they are severally as well as jointly bound (*b*); but a covenant not to sue one of two co-debtors does not operate as a release to the other, even though the debt be joint (*c*).

Effect of a release of all demands.

A release of all demands does not extend to a right of action which arises on a breach of covenant subsequently to the release (*d*), or a legacy payable at a future day, or the like (*e*). But a release of all covenants or legacies will extend to an unbroken covenant or a legacy payable in futuro (*g*).

Release not varied by parol evidence.

The construction of a deed of release cannot, of course, be affected by parol evidence (*h*).

A rent-charge or judgment cannot be released as to part of the lands charged.

It is impossible at law to release from a rent-charge part of the land out of which it is charged, because such a release would be an extinguishment of the rent-charge (*i*). And the same holds good in the case of a judgment after execution levied (*k*). But a release from a judgment of part of the lands of the debtor before execution levied is nugatory, because the releasor had no interest at the time of the release (*l*).

(*a*) Shepp. Touchst. 344.

(*b*) Co. Litt. 232. a.; Com. Dig., Release, (B. 4.): *Dennis* v. *Payn*, Cro. Car. 551; 5 Bac. Abr. 624, Release, G.: *Brooks* v. *Stuart*, 1 Per & Dav. 615.

(*c*) *Hutton* v. *Eyre*, 6 Taunt. 289.

(*d*) Shepp. Touchst. 344.

(*e*) *Lampet's case*, Rep. 46 b.

(*g*) Shepp. Touchst. 342.

(*h*) *Butcher* v. *Butcher*, 1 Bos. & Pull., New Rep. 113; *Brooks* v. *Stuart*, 1 Per. & Dav. 615.

(*i*) Infra, vol. v. p. 494, n. (*a*); and see the precedent lix.

(*k*) 5 Bac. Abr. 713.

(*l*) *Barrow* v. *Gray*, Cro. Eliz. 552.

CHAPTER XIV.

OF INDEMNITY DEEDS.

Indemnities to purchasers and mortgagees.

A PURCHASER cannot in ordinary cases be compelled to complete his purchase with an indemnity against an actual or contingent charge or incumbrance (*a*). But in conditions of sale or in a contract for sale it is often stipulated that an indemnity shall be taken against some charge or incumbrance which does or may affect the lands sold. It is not sufficient, however, to stipulate simply that an indemnity shall be taken; the conditions or contract ought always to specify with particularity the nature of the intended indemnity, for otherwise there is generally a dispute as to the terms (*b*). And when leasehold property held at an entire rent is sold in lots with apportioned rents, it is absolutely necessary to provide each purchaser with an indemnity upon the other lots against the payment of more than his apportioned rent, and against the non-performance of the

(*a*) Ante, vol. iii. p. 33, n. (*l*), and p. 68, n. (*d*). See, too, the recent cases of *Cudden* v. *Cartwright*, 4 You. & Coll. 25; *Pope* v. *Garland*, 3 You. & Coll. 403.

(*b*) See, in the case of a rent-charge, ante, vol. iii. p. 75, n. (*c*); and, as to the mode of indemnity there suggested, (p. 76), see, also, Co. Litt. 146. b., 2 Dru. & War. 266. See, also, vol. v. p. 506, n. (*a*).

covenants of the lease by the purchasers of the other lots (*a*). Indemnities are sometimes given in the case of mortgages, but not very often, because a mortgagee is seldom willing to accept a security which requires an indemnity to make it good. As mortgages, however, according to the present practice, generally contain a power of sale, an indemnity may properly be taken on a mortgage, as well as a purchase. For a mortgagee may be satisfied that the estate is a sufficient security in point of value for his loan over and above the supposed charge, but may at the same time require an indemnity against the charge, in order to enable him, if need be, to effect a sale under his power (*b*).

—to executors and trustees.

Indemnities are frequently given to executors and trustees by some of their cestui que trusts, in order to induce them to part with the trust funds, or apply them in some manner, or advance them upon some security not permitted by the trust. Of course, in these cases, the nature and terms of the indemnity are entirely a matter of stipulation, as it is in the power of the trustees to refuse to commit the breach of trust till a sufficient indemnity is provided. What ought in prudence to be required, must depend wholly on the risk to be run. Thus, for example, if a trustee be desired to pay over the funds to a female tenant for life, unmarried and past child-bearing, and to the persons who are absolutely entitled on her death with-

(*a*) Ante, vol. iii. p. 83, n. (*d*).

(*b*) See a precedent of an indemnity to mortgagees, infra, vol. v. prec. lxv. p. 519.

out issue, a covenant by the cestui que trusts in addition to the ordinary release is a sufficient indemnity. But if the supposed payment would only be correct in case of the death of the tenant for life in the lifetime of another person, it is obvious that a very substantial risk is run, and a very substantial indemnity required.

Personal indemnities.

It is hardly necessary to observe that personal indemnities by bond or covenant, which depend wholly on the continued ability of the person who gives them, are far inferior in value to those made by a charge on property. But, in a great number of cases, no other indemnity can be had than what is afforded by a bond or covenant. A policy of life assurance is often used as an indemnity, and is of great value when a fund is secured for payment of the premiums, and when no claim is likely to be made until the death of the person (a tenant for life for example) on whose life the policy is effected (*a*).

(*a*) See further, vol. v. p. 501.

CHAPTER XV.

OF STAMPS ON ASSURANCES.

General observations.

In Mr. Martin's scheme of this work, a fourth book was devoted to the subject of stamps, with the intention, it is presumed, of inserting a complete treatise on the subject. This intention, however, has been found wholly incompatible with our prescribed limits, and has been fortunately rendered unnecessary by the publication of a work which contains the law on the subject in a very complete and well-arranged form (*a*).

It may be convenient, however, to notice one or two points which occur in conveyancers' practice, but which have not, it is believed, been the subject of judicial decisions.

Ad valorem settlement stamp payable only on the sums actually specified in the settlement of money or public funds.

It seems to be often supposed by solicitors, that when personal property, or a share of personal property, described in general terms, (as the residue of a testator's estate, for example), is made the subject of settlement, the settlement must be stamped with an ad valorem stamp sufficient to cover the supposed value of such property or share. This, however, is a complete mistake; the ad valorem stamp is only

(*a*) The Stamp Laws, considered with a view to their Influence on the Admission of Deeds and other Writings, in Evidence, by George William Collins, esq., 1841.

required to cover such definite and certain principal sums of money, or definite and certain shares of the public funds, or of Bank Stock, East India Stock, or South Sea Stock, as are actually specified in the settlement. Shares, even in public companies, except those specified in the act, do not appear to be liable to the duty, although the money secured on the notes or debentures of such companies would be liable.

Whether a settlement of land containing a term to raise portions must be stamped for the amount of the portions as a money settlement.

A much more serious question with regard to settlements of real estate is, whether a settlement, which contains a term for raising portions for younger children or otherwise, ought not to be stamped with an ad valorem stamp upon the amount of the portions. In practice, it is not usual to affix such a stamp, on the ground that the instrument is substantially a settlement of land, and not of money. It is, however, difficult to say that it is not also a settlement of money, for if the object of the deed were to raise the portions, and nothing more, there could be no doubt of its being a settlement of money within the meaning of the act.

The price of timber and fixtures subject to the ad valorem duty on conveyances;

—but not so of chattels.

On conveyances of land of any tenure, the price of the timber and fixtures, if valued separately, must be added to the purchase money, and pay ad valorem duty, because they are part of the freehold, and pass by the conveyance. But the price of chattels which are not fixed to the freehold, and which pass by delivery, should not be added to the purchase-money so as to pay duty, unless for some special reason it is deemed expedient to assign such chattels by the purchase deed (*a*).

(*a*) See, infra, vol. iii. p. 104, n. (*b*).

Duty on purchase-money payable by instalments, or an annuity for a term certain.

In the case of *Beete* v. *Bidgood* (*a*), it was agreed that the price of an estate should be paid by instalments, with interest at 6*l.* per cent. on the several instalments up to the respective days of payment, making a total sum, which was specified. And it was held that this was not an usurious contract, for that the real contract was for the sale of the estate at the total sum ultimately specified to be paid by instalments; and that speaking of interest on the sum originally agreed upon as the present price was the mere mistake of the parties. The case is referred to here for the purpose of observing, that, in a similar case, the ad valorem duty on the conveyance must be paid on the gross sum made up of principal and interest, and not on the principal merely. Indeed, notwithstanding this decision, it would be wise, in framing the conveyance, not to speak of the original price or of interest, but to recite the contract as a contract for sale at the total sum made up of the principal and interest. If property is conveyed in consideration of an annuity for life, it is clear that no ad valorem duty is payable (*b*); but if the consideration be an annuity for a term certain, this seems to be equivalent to the payment by annual instalments of a gross sum, equal to the total amount of the payments of the annuity, and to be chargeable with ad valorem duty accordingly. The courts will determine whether an annuity is really and sub-

(*a*) 7 B. & C. 453.

(*b*) See *Blandy* v. *Herbert*, 9 B. & C. 396; *Massy* v. *Nanney*, 3 Bing. N. C. 478.

stantially an annuity, or merely a contract for the payment of principal and interest by instalments (*a*).

The ad valorem duty on conveyances is imposed only on a sale of property; there must therefore be a sale and property both in the ordinary acceptance of the terms. Ad valorem duty attaches only on,

Thus, when, on a dissolution of partnership, one partner takes the share of the other at a given price, no ad valorem duty attaches (*b*). And a deed which is, in fact, a family arrangement, although money is paid as part of it, does not need to be stamped as a conveyance upon a sale (*c*). And where a tenant for life gave up a sum of stock to the reversioner in consideration of a life annuity, and an assignment of a policy of assurance, no ad valorem duty was held to attach (*d*). —a sale;

So, too, the goodwill of a trade would seem not to be property within the meaning of the act; but this can hardly be deemed to be well established (*e*). A goodwill is, however, usually sold with stock, debts, and other things which are assigned, and on which, if they are assigned by deed, the ad valorem duty must probably be paid. A judgment debt has, however, been held not to be property (*g*). —of property, in the common acceptance of the terms.

(*a*) *Chillingworth* v. *Chillingworth*, 8 Sim. 404.

(*b*) *Belcher* v. *Sikes*, 6 B. & C. 234.

(*c*). *Denn* d. *Manifold* v. *Diamond*, 4 B. & C. 243; *Massy* v. *Nanney*, 3 Bing. N. C. 478.

(*d*) *Blandy* v. *Herbert*, 9 B. & C. 396.

(*e*) *Lyburn* v. *Warrington*, 1 Stark. 162. See, however, *South* v. *Finch*, 3 Bing. N. C. 506.

(*g*) *Warren* v. *Howe*, 2 B. & C. 281.

Conveyance in satisfaction of a debt liable to duty on the debt.

A conveyance, made in satisfaction of a mortgage or other debt from the vendor to the purchaser, must pay ad valorem duty on the amount of the debt; or if the satisfaction of the debt be part only of the consideration, the amount of it must be added to the rest of the consideration in charging the ad valorem duty. If, as not unfrequently happens, the debt considerably exceeds the value of the property, the payment of ad valorem duty is a great hardship; but it is better to pay the duty than run any risk of getting an invalid conveyance, or stating a false consideration.

What consideration exempts a conveyance from duty.

A conveyance in consideration of a life annuity, or of stock, or any property other than money, is not liable to an ad valorem duty; the act contains no provision on the subject of sales, for any consideration except money actually paid, or a debt discharged.

Duty on transfer of mortgages.

One of the most embarrassing points of stamp law is with regard to the stamps on transfers of mortgages. The practical result to be deduced from the statutes and cases (*a*) seems, however, to be, that the mortgage duty is not to be paid over again on a transfer on any sum on which the duty has been paid, whatever may be the form of the transfer. It is, for instance, immaterial whether the transfer is made subject to the old equity of redemption, or discharged from it, and subject to a new equity of redemption, or whether, upon the transfer of a mortgage originally

(*a*) Collins, p. 181, n. (51), p. 186, n. (53).

for a term, the fee be conveyed as a further security. But if the new mortgage be not by the same person as the old one, and there be a further advance and a further security, or if one, or two, or more subsisting mortgages be paid off, and a completely new mortgage made to secure the new debt, then, and in all similarly complicated cases, it is most prudent to treat the new mortgage as a transaction de novo, and stamp the deed with the original ad valorem mortgage stamp on the whole amount advanced. The mortgage stamps are not very heavy, and if there is the slightest doubt, it is, of course, to be decided against the mortgagor.

No duty on a sum of money secured by covenant only.

It should be observed, that no ad valorem duty is payable in respect of a sum of money secured only by covenant. This is an omission in the Stamp Act which will probably be supplied on some future occasion.

APPENDIX.

PURCHASE DEEDS.

I.

CONVEYANCE *by* APPOINTMENT *alone of a* PIECE *of* LAND *on a* SALE *in* CONSIDERATION *of a* RENT-CHARGE.—RESERVATION *of* MINERALS.—COVENANTS *and* PROVISO *for compelling the* PURCHASER *to* BUILD *and* MAINTAIN HOUSES *on the Land* (*a*).

CONVEYANCE IN CONSIDERATION OF A RENTCHARGE.

THIS INDENTURE, made &c., BETWEEN A. B., of &c., [*vendor*] of the one part, and C. D., of &c., [*purchaser*] of the other part: WHEREAS the plot or parcel of land and hereditaments hereinafter described, and intended to be hereby appointed, together with other hereditaments in the county of ——, now stand limited to the use of such person or persons, for such estate and estates, interest and interests, and for such uses, intents and purposes, and charged and chargeable with such sum and sums of money, and subject to such powers, provisos, limitations and restrictions as the said A. B. shall from time to time, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, direct, limit, or appoint. And in default of and until and subject to such direction, limitation or appointment, to the use of the said

Parties.

Recital that the land to be conveyed stands limited to such uses as the vendor shall appoint, and subject thereto to him in fee;

(*a*) Many of the forms in this precedent are in more concise language than the ordinary forms, so as to render it appropriate for the conveyance of small lots of ground for building purposes.

CONVEYANCE IN CONSIDERATION OF A RENTCHARGE.

—of contract for sale.

A. B., his heirs and assigns for ever (*b*): AND WHEREAS the said A. B. hath contracted with the said C. D. for the sale to him of the plot or parcel of land and hereditaments hereinafter described and intended to be hereby appointed, with the appurtenances and the fee simple and inheritance thereof in possession, free from incumbrances, but with the saving and exceptions hereinafter contained, in consideration of the annual sum or yearly rent-charge hereinafter reserved and limited to the said A. B., his heirs and assigns, out of the said plot or parcel of land and hereditaments, and also in consideration of the covenants hereinafter contained on the part of the said C. D. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the said yearly rent-charge hereinafter reserved or limited, and also in consideration of the several covenants hereinafter contained and on the part of the said C. D., his heirs, executors, administrators, and assigns, to be performed and kept, and pursuant to and by force and virtue and in exercise and execution of the power or authority to the said A. B. given or limited as hereinbefore is mentioned, and of every or any other power in anywise enabling him in this behalf, he the said A. B. doth, by this present deed or instrument in writing by him sealed and delivered in the presence of and attested by the two credible persons whose names are intended to be hereupon endorsed as witnesses attesting the sealing and delivery of these premises by him the said A. B., direct, limit and appoint that ALL THAT, &c. [*parcels*] and the boundaries, shape and dimensions of which are shewn in the plan thereof drawn on the margin of these presents; TOGETHER with all commons, ways, waters,

Witnesseth.

Appointment.

Parcels.

General words.

Power of appointment immediately preceding a limitation of the fee to the donee.

(*b*) It was formerly doubted whether a general power of appointment immediately preceding a limitation in fee to the donee would not be merged in the fee, but it is now settled that the power and fee may well subsist together; (1 Sugd. Pow. ch. 11, sect. 6, p. 104, 6th edit.); and it is also established that an appointment under such a power will exclude the right of dower. (*Ray* v. *Pung*, 5 B. & Ald. 561; S. C. 5 Madd. 310). The limitations recited in the text are shorter than the usual limitations to uses to bar dower, and may conveniently be adopted whenever an immediate sale of the property is intended. If, however, no appointment be made in the lifetime of the donee of the power, and he die leaving a widow married to him before the 1st of January, 1834, her dower would attach; and so, likewise, would the dower of a widow married after the 1st of January, 1834, if there be no declaration in the purchase-deed to the contrary. See, infra, Vol. III., p. 205, n. (*s*).

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watercourses, rights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the said plot or parcel of land belonging or in anywise appertaining, or with the same or any part thereof, now or at any time heretofore held, used, occupied or enjoyed (*c*), BUT SAVE NEVERTHELESS, and except out of this present direction, limitation and appointment, all mines and minerals lying under the said land and hereditaments hereinbefore described, or any part thereof, with free liberty for the said A. B., his appointees, heirs and assigns to take all usual and necessary means for working, getting and taking away the said mines and minerals, and also liberty to make and repair tunnels and sewers, and to lay and repair pipes for conveying water to and from any manufactory or other buildings, or for any other purpose whatsoever, (paying and making reasonable compensation for all damages to be incurred thereby), shall henceforth go, remain, and be (*d*), TO THE USE that the said A. B., his heirs and assigns, shall henceforth receive and take one annual sum or yearly rent-charge of £——, to be chargeable upon and issuing and payable out of the said plot or parcel of land, hereditaments and premises hereby appointed, or expressed and intended so to be, and to be paid by equal half-yearly payments, on the —— day of —— and the —— day of —— in every year, without any deduction or abatement whatsoever, the first half-yearly payment

Exception of minerals.

To the use that the vendor may receive a rent-charge;

(*c*) In conveying a plot of land marked out for the first time from a larger piece, the ordinary general words are inappropriate. Even those in the text may, without impropriety, be changed into "with the rights, easements, and appurtenances."

(*d*) The ordinary mode of conveyance, when the vendor has an absolute power of appointment, and the inheritance in default of appointment is by appointment, and also by lease and release, in separate witnessing parts of the conveyance. See, infra, Vol. III., Precedent XVII., p. 205; and Id. p. 212, n. (*g*). The reason for conveying the estate, as well as exercising the power, is the possibility that the power may, by some dealing with the estate, have been extinguished or merged; but, unless there be some ground for believing this to be really the case, it is improper, in conveying small pieces of land, or other property of trifling value, to put the parties to the additional expense of a second witnessing part, and the stamp on a lease for a year. If the power have been only just created, as on a new purchase, and the estate is being settled or mortgaged, the additional conveyance by lease and release may most properly, in all cases, be dispensed with.

Conveyance by appointment alone.

CONVEYANCE IN CONSIDERATION OF A RENTCHARGE.

of the said annual sum or yearly rent-charge of £—— to be made on the —— day of ——. AND TO THIS FURTHER USE AND INTENT, that, when and so often as the said annual sum or yearly rent-charge of £——, or any part thereof, shall at any time or times be unpaid by the space of twenty-one days next after any of the days hereby appointed for the payment thereof as aforesaid, then and so often it shall be lawful for the said A. B., his heirs or assigns, to enter into and distrain upon the said plot or parcel of land, hereditaments and premises hereinbefore limited and appointed, or expressed and intended so to be, or any part thereof, and to dispose of the said distress or distresses then and there found according to law, to the intent that thereby or otherwise the said annual sum or yearly rent-charge of £——, and every part thereof so in arrear and unpaid, and all expenses occasioned by the non-payment thereof, shall be fully satisfied: AND TO THIS FURTHER USE AND INTENT, that, in case the said annual sum or yearly rent-charge of £——, or any part thereof, shall at any time or times be unpaid for the space of forty days next after any of the days hereby appointed for the payment thereof as aforesaid, then and so often (although there shall not have been any legal demand made thereof) it shall be lawful for the said A. B., his heirs and assigns, to enter into and upon and hold the plot or parcel of land, hereditaments and premises hereinbefore limited and appointed, or expressed and intended so to be, and to have, receive, and take the rents, issues, and profits thereof to his and their own use until he or they shall therewith and thereby or otherwise be fully paid and satisfied the said annual sum or yearly rent-charge of £——, and the arrears thereof due at the time of such entry, or afterwards to become due during his or their being in possession of the same premises; Together with all expenses which he or they shall sustain by reason of the non-payment thereof, and such possession when taken to be without impeachment of waste (*e*); AND SUBJECT and charged as hereinbefore is mentioned, TO THE USE of the said C. D., his heirs and assigns for ever. AND THE SAID A. B. doth hereby, for himself, his heirs, executors and administrators, covenant with the said C. D., his heirs and assigns, in

—with power of distress

—and entry;

—and subject thereto, to the purchaser in fee.

Covenants by the vendor for right to appoint,

Powers of distress and entry.

(*e*) With respect to powers of distress and entry, see, infra, Vol. IV., p. 504, n. (*h*), p. 577, n. (*c*). See, too, *Saffery* v. *Elgood*, 1 Ad. & Ell. 191; S. C. 3 Nev. & Mann. 346; *Johnson* v. *Faulkner*, 2 Gale & Dav. 184.

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manner following; (that is to say), that for and notwithstanding any act, matter, or thing by him the said A. B. at any time heretofore made, done, committed, or suffered, or knowingly or willingly permitted to the contrary, he the said A. B. now hath full power to appoint the said hereditaments and premises to the uses and in manner aforesaid free from all incumbrances whatsoever (*f*). AND THAT it shall be lawful for the said C. D., his heirs and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into and upon, and to have, hold, occupy, possess, and enjoy the said hereditaments and premises hereinbefore limited and appointed, or expressed and intended so to be, and to receive and take the rents, issues, and profits thereof to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever from or by the said A. B., or his heirs, or any other person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or any of them, except in respect of the said annual sum or yearly rent-charge of £——, and the powers and remedies hereby limited for enforcing the payment thereof when in arrear: AND FURTHER that he the said A. B., his heirs and appointees, and all other persons claiming or to claim under or in trust for him the said A. B., his heirs or appointees, shall and will from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said C. D., his heirs or assigns, make, do, acknowledge and execute, or cause and procure to be made, done, acknowledged and executed, all and every such further and other lawful acts, deeds, things, appointments, conveyances, and assurances in the law whatsoever, for the further, better, and more perfectly and absolutely appointing, conveying, and assuring of the said hereditaments and premises hereinbefore limited and appointed, or expressed and intended so to be, and every part thereof, to the uses and in manner aforesaid, as by the said C. D., his heirs or assigns, or his or their counsel in the law, shall be reasonably devised or advised and required. AND THE SAID C. D. doth hereby for himself, his heirs, executors, administrators, and assigns, covenant

—for quiet enjoyment,

—for further assurance.

Covenant by the purchaser to pay the rent-charge;

(*f*) This is not, it will be observed, an absolute covenant against incumbrances, but only a covenant that, notwithstanding any act on the part of the vendor, he has right to appoint the estate free from incumbrances.

CONVEYANCE IN CONSIDERATION OF A RENTCHARGE.

with the said A. B., his heirs and assigns, in manner following: (that is to say), that he the said C. D., his heirs, executors, administrators, or assigns, or some one of them, shall and will from time to time and at all times hereafter, well and truly pay or cause to be paid unto the said A. B., his heirs and assigns, the said annual sum or yearly rent-charge of £—— as the same shall become due and payable, without any deduction or abatement whatsoever, in manner aforesaid, according to the true intent and meaning of these presents (*g*): AND THAT it shall be lawful for the said A. B., his heirs and assigns, with workmen and others in his and their company or without, and for any engineers, surveyors, agents, or workmen, to be authorized by him or them, with horses and carts, and other apparatus as occasion may require, at all times hereafter to come into and upon the said plot or parcel of land, hereditaments and premises, to examine the state and condition of the mines and minerals hereinbefore reserved, and to work and get the same, or to make or repair the tunnels, sewers, or pipes, hereinbefore mentioned or referred to, according to the true intent and meaning of the exception and reservation hereinbefore contained; he the said A. B., his heirs and assigns, making satisfaction to the said C. D., his heirs and assigns, for any damages to be occasioned thereby: AND ALSO, that the said C, D., his heirs, executors, administrators, or assigns, shall and will, within the space of twelve calendar months from the date hereof, at his or their own expense erect, build, and finish upon the said plot or parcel of land hereinbefore limited and appointed, or expressed and intended so to be, or some part thereof, one or more good and substantial messuage or dwelling-house, or messuages or dwelling-houses, or other buildings, which, when finished, shall be of the clear yearly value of £—— at the least, to be let to a tenant or tenants;

—and to allow the vendor to get the minerals;

—and within a given time to build one or more houses on the land,

(*g*) When a conveyance is made in consideration of a rent-charge, and a covenant by the purchaser to pay it, the land must be conveyed to the purchaser in fee-simple, in order to make the burden of the covenant run with the land. For, if a power of appointment be limited to the purchaser, a person taking under an appointment will take, as if the original conveyance had been made to himself; consequently, there will be no privity of estate between the original purchaser and the appointee, and the covenant of the original purchaser, although expressly embracing his assigns, will not bind the appointee. (*Roach* v. *Wadham*, 6 East, 289; 2 Sugd. Pow. 29, 6th edit.; 2 Sugd. Vend. and Purch. 463, 10th edit.). Supra, p. 374.

Conveyance in consideration of a rent-charge covenanted to be paid by the purchaser should be to him in fee.

CONVEYANCE IN CONSIDERATION OF A RENTCHARGE.

AND THE SAID messuage or dwelling-house, messuages or dwelling-houses and other buildings, when so erected, or built and finished, shall and will at all times well and sufficiently repair and keep in good condition, and of such yearly value as aforesaid: AND ALSO shall and will at his or their own expense insure, or cause to be insured, the said buildings so to be erected as aforesaid in some or one of the public offices of insurance, against any casualty or damage that may happen to the same by fire, in a sum not less than two-thirds the value thereof; and in like manner keep and continue the same and every part thereof insured for ever thereafter, and produce the policy or policies of such insurance, and the receipts for the premium in respect thereof, whenever required by the said A. B., his heirs or assigns (*h*). PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, and these presents are upon this express condition, that, in case the said C. D., his heirs or assigns, shall neglect or fail to perform the covenant hereinbefore contained for the erection and building, within the space of twelve calendar months from the date hereof, of one or more good and substantial messuage or dwelling-house, messuages or dwelling-houses, or other buildings on the said plot or parcel of ground,

—and always keep the same in repair, and insured.

Power for the vendor to re-enter in case of the failure of the purchaser to perform the covenant to build.

(*h*) It is very questionable how far these covenants, to build, repair, and insure, would be specifically enforced in equity, and how far at law they would run with the land, so as to bind the assignee. For, as a general rule, a person parting absolutely with his estate cannot prescribe that it shall be used or enjoyed in a particular manner. Against the purchaser himself an action of covenant may be maintained, and damages (nominal or real) recovered; but, it is not clear that even he would be decreed specifically to perform his covenants, unless it could be shewn that the security for his rent-charge is substantially affected by the non-performance; and the difficulty of enforcing the performance is enhanced when the land has been aliened to a third party. The subject is fully discussed in 2 Sugd. Vend. and Purch. 496 et seq. 10th edit. See, too, infra, Vol. IV., p. 117, n. (*e*), and *Whatman* v. *Gibson*, 9 Sim. 196; *Schreiber* v. *Creed*, 10 Sim. 9. See, too, further, supra, p. 376 et seq. The object of the covenants is to ensure that there shall always be such a building on the land as shall form an adequate security for the rent-charge; but it is suggested that a better plan than that adopted in the precedent would be to enter into a contract to convey the land when the purchaser shall have completed a proper house, as is often done preparatory to granting a lease; see infra, Vol. IV., Precedent II., p. 11; and then to dispense with covenants on the part of the purchaser, trusting that his own interest will always induce him to keep the house in proper repair.

How far covenants to build &c., entered into by a purchaser of the fee, can be enforced.

CONVEYANCE IN CONSIDERATION OF A RENTCHARGE.

hereby limited and appointed, or expressed and intended so to be, then and in such case it shall be lawful for the said A. B., or his heirs, to enter into and upon the said piece or parcel of land, hereditaments and premises hereby limited and appointed, or expressed and intended so to be, and hold and enjoy the same and the rents and profits thereof for his and their own benefit as in his or their old or former estate, anything hereinbefore contained to the contrary thereof in anywise notwithstanding (*i*). IN WITNESS &c.

(*i*) This proviso could not be extended to a failure to build within an unlimited time, or to the failure to keep in repair or insured, for otherwise it would be a shifting or springing use, to take effect at any time, however remote, and, consequently, would be void, as being in the nature of a perpetuity.

II.

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

CONVEYANCE *of* FREEHOLDS *by a* SECOND MORTGAGEE *in pursuance of a* POWER *of* SALE *in his Mortgage, and* SUBJECT *to the* FIRST MORTGAGE. THE FIRST MORTGAGEES *join in the Conveyance, and their Mortgage Debt is secured by the* COVENANT *of the* PURCHASER, *and a* NEW PROVISO *for* REDEMPTION *and* POWER *of* SALE *as in an* ORIGINAL MORTGAGE.

Parties.

THIS INDENTURE, made &c., BETWEEN A. B. of &c., C. D. of &c., and E. F. of &c., [*first mortgagees*] of the first part, G. H. of &c., [*second mortgagee*] of the second part; and I. K. of &c., [*purchaser*] of the third part: WHEREAS by an indenture of release, bearing date the —— day of ——, grounded on a lease for a year, and made or expressed to be made between [*parties*], the capital messuage or mansion-house, pieces or parcels of ground, and hereditaments hereinafter particularly mentioned and intended to be hereby released, were, with the appurtenants, conveyed, assured and limited to such uses, and for such estate and estates, and in such manner as the said X. Y. should

Recital of the conveyance to uses to bar dower in favour of the mortgagor.

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at any time, and from time to time, by any deed or deeds, direct or appoint; and in default of and until and subject to such direction and appointment to the use of the said X. Y. and his assigns during his life, without impeachment of waste, with remainder to the use of the said Y. Z., his executors and administrators, during the life of the said X. Y., upon trust for the said X. Y. and his assigns, with remainder to the use of the said X. Y., his heirs and assigns for ever. AND WHEREAS by an indenture of appointment and release, bearing date the —— day of ——, grounded, as far as the same operated as a release, on a lease for a year, and made or expected to be made between the said X. Y. of the one part, and the said A. B., C. D., and E. F. of the other part, in consideration of the sum of £—— to the said X. Y., paid by the said A. B., C. D., and E. F., the said X. Y., by virtue of the power given him by the hereinbefore recited indenture as aforesaid, did direct, limit, and appoint that the capital messuage or mansion-house, pieces or parcels of land or ground, and hereditaments comprised in the hereinbefore-recited indenture, with their appurtenances, should thenceforth go, remain, and be to the use of the said A. B., C. D., and E. F., their heirs and assigns for ever, subject, nevertheless, to the proviso for redemption therein contained and hereinafter mentioned. And by the said indenture now in recital, for the consideration aforesaid, the said X. Y. did grant and release unto the said A. B., C. D., and E. F., their heirs and assigns, the said capital messuage or mansion-house, pieces or parcels of land or ground, and hereditaments comprised in the hereinbefore-recited indenture, with their appurtenances, to hold the same unto and to the use of the said A. B., C. D., and E. F., their heirs and assigns, subject to the proviso in the said indenture now in recital contained, for redemption of the same premises on payment by the said X. Y., his heirs, executors, administrators, or assigns unto the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, of the sum of £——, on the day therein mentioned, with interest for the same after the rate and on the days and in manner therein mentioned for payment of the same. AND WHEREAS by an indenture bearing date the —— day of ——, and made or expressed to be made between the said X. Y. of the one part, and the said G. H. of the other part, in consideration of the sum of £—— to the said X. Y. paid by the said G. H., the

Recital of the first mortgage.

Recital of the second mortgage;

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

said X. Y. did direct and appoint that the said A. B., C. D., and E. F., their heirs and assigns, should, after payment of the said principal sum of £——, secured to them as aforesaid, and all interest thereon, convey and assure the hereditaments in the indenture now in recital subsequently described, and intended to be thereby granted and released, to the use of the said G. H., his heirs and assigns, subject to the provisos, conditions, covenants, stipulations, and agreements thereinafter contained, and in part hereinafter mentioned. And by the said indenture now in recital, for the considerations aforesaid, the said X. Y. did grant, release, and confirm unto the said G. H., his heirs and assigns, the said capital messuage or mansion-house, pieces or parcels of land or ground and hereditaments comprised in the hereinbefore recited indenture of the —— day of ——, [*the first mortgage*], to hold the same unto and to the use of the said G. H., his heirs and assigns for ever; subject, nevertheless, to the said mortgage security of the —— day of ——, and subject to the proviso in the said indenture now in recital contained, for redemption of the same premises on payment by the said X. Y., his heirs and assigns, unto the said G. H., his heirs, executors, administrators, or assigns, of the sum of £——, with interest for the same, after the rate and on the day therein mentioned. And it was, by the said indenture now in recital, provided &c. [*recital verbatim of the powers of sale, and of the mortgagee's power to give receipts to purchasers*] (*a*). And it was, by the said indenture now in recital, provided that it should be lawful for the said G. H., his executors, administrators, or assigns, in execution of the said power of sale, to sell the said hereditaments subject to or discharged from the said mortgage security to the said A. B., C. D., and E. F.

—of the money on the first mortgage being still owing,

AND WHEREAS the said principal sum of £——, intended to be secured by the said indenture of the —— day of ——, [*the first mortgage*], is now due to the said A. B., C. D., and E. F., on the security of the same indenture, but all interest for the same hath been paid up to the day of the date of these presents.

—and that on the second;

AND WHEREAS the said principal sum of £——, intended to be secured by the said indenture of the —— day of —— [*the second mortgage*], together with certain interest thereon, is now due to the said G. H. on the security of the same indenture.

—of the contract for sale

AND WHEREAS the said G. H., in exercise

(*a*) See infra, Vol. III., p. 247, n. (c).

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

of the said power of sale given to him by the said indenture of the —— day of ——, as hereinbefore is mentioned, hath contracted and agreed with the said I. K. for the absolute sale to him of the said capital messuage, or mansion-house, pieces of ground, and hereditaments hereinafter particularly mentioned and intended to be hereby released, with the appurtenances and the inheritance thereof, in fee simple in possession, free from incumbrances, (except an annual payment of £—— in lieu of land-tax), at or for the price or sum of £——. AND WHEREAS, upon the treaty for the said sale, it was agreed that the said sum of £——, so owing to the said A. B., C. D., and E. F., on the security of the hereinbefore-recited indenture of the —— day of ——, [*the first mortgage*], as aforesaid, should not be paid off, but should be retained by the said I. K. out of the said purchase money or sum of £——, and that the said A. B., C. D., and E. F. should join in these presents in manner hereinafter appearing, and that the payment of the said sum of £——, so owing to them as aforesaid, with interest as hereinafter mentioned, should be secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that, for effectuating the said sale, and in pursuance of the said agreements, and in consideration of the said sum of £——, so owing to the said A. B., C. D., and E. F., as hereinbefore is mentioned, and of the covenant hereinafter contained on the part of the said I. K. for payment of the same, with interest, as hereinafter is mentioned; and in consideration of the further sum of £——, at or immediately before the sealing and delivery of these presents to the said G. H., paid by the said I. K., (the retainer and receipt of which said sums of £—— and £—— respectively making together the said entire purchase money of £——, he the said G. H. doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said I. K., his heirs, executors, administrators, and assigns for ever, by these presents, and doth declare the same to be in full for the purchase of the said hereditaments hereinafter described and intended to be hereby released), they the said A. B., C. D., and E. F., at the request and by the direction of the said G. H., (testified by his being a party to and sealing and delivering these presents), do, and each of them doth, by these presents (made in pursuance of an act, &c.) [*infra, Vol. V. p.* 266] release, and the said G. H., in exercise and execution of the said power for this purpose given to him by the

—of the agreement that the first mortgage debt should be retained by the purchaser, and be secured afresh by the conveyance.

Witnesseth.

Consideration.

Receipt.

Conveyance by first and second mortgagees.

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

hereinbefore-recited indenture of the —— day of ——, [*the second mortgage*], and of every or any other power, authority, or estate in anywise enabling him in this behalf, doth by these presents (made in pursuance of the act aforesaid) release and confirm unto the said I. K. and his heirs ALL THAT, &c. [*parcels—general words*] TO HAVE AND TO HOLD the said capital messuage, or mansion-house, pieces and parcels of land and hereditaments, and all and singular other the premises hereinbefore released or expressed and intended so to be, UNTO the said I. K. and his heirs, TO THE USE of the said A. B., C. D., and E. F., their heirs and assigns for ever, freed and discharged from the said principal sum of £——, intended to be secured by the said indenture of the —— day of ——, [*the second mortgage*], and all interest for the same, and all right or equity of redemption, and all other claims and demands under or by virtue of the same indenture, and also freed and discharged from all right or equity of redemption under or by virtue of the said indenture of the —— day of ——, [*the first mortgage*], but subject to the aforesaid annual payment of £—— in lieu of land-tax, and to the proviso or condition hereinafter contained for redemption of the same premises. AND EACH OF THEM THE SAID A. B., C. D., E. F., and G. H., so far as relates to his own acts and deeds, doth hereby for himself, his heirs, executors, and administrators, covenant with the said I. K., his heirs and assigns, that they the said A. B., C. D., E. F., and G. H. respectively have not at any time heretofore made, done, committed, or executed, or knowingly or willingly permitted or suffered or been party or privy to any act, deed, matter, or thing whatsoever whereby or by means whereof the said hereditaments and premises hereinbefore released or expressed, and intended so to be, or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever, or whereby or by means whereof he the said G. H. is in anywise prevented or hindered from exercising in manner aforesaid the power of sale given him by the said indenture of the —— day of ——, [*the second mortgage*], as aforesaid, or whereby, or by reason or means whereof, they the said A. B., C. D., E. F., and G. H., are in anywise prevented or hindered from releasing the same premises in manner aforesaid, according to the true intent and meaning of these presents. AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance

Parcels.

General words.

Habendum to the purchaser, to the use of the first mortgagees, discharged from the subsisting equity of redemption, but subject to the new proviso for redemption.

Covenants by the mortgagees against incumbrances, and by the second mortgagee for right to exercise his power of sale.

Witnesseth further.

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

of the said agreement on behalf of the said I. K., and in consideration of the release hereinbefore contained, and of the proviso for redemption hereinafter contained, he, the said I. K., doth hereby, for himself, his heirs, executors, and administrators, covenant with the said A. B., C. D., and E. F., their executors and administrators, that he the said I. K., his heirs, executors, or administrators, shall and will pay, or cause to be paid, unto the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, the sum of £——, and the sum of £—— as or for one year's interest for the same, at the rate of £—— for £100 for a year, making together the sum of £—— in the parts, shares, and proportions, and on or at the days and times following; (that is to say), the sum of £——, being half a year's interest for the said sum of £—— at the rate aforesaid, on the —— day of —— next ensuing the date of these presents, which will be in the year 18—; and the sum of £——, residue thereof, being the whole of the said principal sum of £——, and another half-year's interest for the same, at the rate aforesaid, on the —— day of —— then next following, which will be in the year 18—, without any deduction or abatement for or in respect of any taxes, rates, assessments, payments, or outgoings, or any other matter, cause, or thing whatsoever; PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said I. K. and the said A. B., C. D., and E. F., and the true intent and meaning of them and of these presents is, that if the said I. K., his heirs, executors, administrators, or assigns, shall pay, or cause to be paid, to the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, the aforesaid sum of £——, [*the aggregate of principal and one year's interest*], in the parts, shares, and proportions, and on or at the days or times in the covenant hereinbefore contained mentioned for the payment thereof, without any deduction or abatement whatsoever as aforesaid, according to the true intent and meaning of these presents; then and in such case they, the said A. B., C. D., and E. F., or the survivors or survivor of them, or the heirs of such survivor, their or his assigns, shall and will, at any time after such payment shall have been so made as aforesaid, upon the request and at the costs and charges of the said I. K., his heirs or assigns, reconvey the said hereditaments and premises hereinbefore released or expressed, and in-

Covenant by the purchaser with the first mortgagees for payment of their mortgage debt, with interest.

Proviso for redemption.

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

tended so to be, unto the said I. K., his heirs and assigns, or as he or they shall, in that behalf, order or direct, free from all incumbrances whatsoever, made, done, or committed by the said A. B., C. D., and E. F., or any of them, their or any of their heirs, executors, administrators, or assigns, so as for the doing thereof the said A. B., C. D., and E. F., or any of them, their or any of their heirs, executors, administrators, or assigns, be not compelled to go or travel from the place or places of their or any of their usual abode or dwelling: AND HE THE SAID I. K. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said A. B., C. D., and E. F., their executors and administrators, that in case the said principal sum of £——, or any part thereof, shall not be paid at the time in the covenant hereinbefore contained mentioned for the payment thereof, he, the said I. K., his heirs, executors, or administrators, shall and will, so long as the said sum of £——, or any part thereof, shall remain unpaid, pay or cause to be paid to the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, interest for the said sum of £——, or for so much thereof as shall for the time being remain unpaid, after the rate of £—— for £100 for a year, by equal half-yearly payments on the —— day of —— and the —— day of —— in every year, without any deduction or abatement for or in respect of any taxes, rates, assessments, payments, outgoings, or any other matter, cause, or thing whatsoever: PROVIDED ALWAYS, and the said A. B., C. D., and E. F., do hereby for themselves, their heirs, executors, and administrators, covenant with the said I. K., his heirs, executors, administrators, and assigns, that if the said I. K., his heirs, executors, administrators, or assigns, shall, half-yearly, on every —— day of ——, and —— day of ——, until the —— day of —— 18—, or within one calendar month next after each of the said days respectively, pay to the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, interest for the said sum of £——, at the rate aforesaid, up to the same half-yearly days of payment respectively, and shall and do, perform, observe, and fulfil all and every the covenants hereinafter contained; then and in such case they the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, shall not, nor

Covenant by the purchaser with the first mortgagees for payment of interest half-yearly, if the principal remains unpaid after the appointed day.

Proviso that the mortgage money shall not be called in for a time certain, if the interest be regularly paid.

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

will, before the said —— day of —— 18—, call in or compel payment of the said principal sum of £——, or any part thereof: PROVIDED ALWAYS, and it is hereby further agreed and declared, that, if at any time or times whilst the said principal sum of £—— shall continue on this present security, the interest thereon shall be in arrear and unpaid for one calendar month and upwards next after any day whereon half a year's interest shall become due or payable, and the interest being so in arrear, the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such surviror, their or his assigns, shall neglect or forbear to call in or compel payment of the said sum of £——, or shall accept interest for the same, then and in such case the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, shall not be thereby prevented or precluded from calling in or compelling payment of the said sum of £——, or the interest thereon, at any time before the said —— day of —— 18—; PROVIDED ALSO, and it is hereby further agreed and declared, that it shall not be lawful for the said I. K., his heirs, executors, administrators, or assigns, at any time before the —— day of ——, to oblige or compel the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, to receive the said sum of £—— or any part thereof (*b*): PROVIDED ALWAYS, and it is hereby agreed and declared, that the said sum of £——, so advanced and paid by the said A. B., C. D., and E. F. as aforesaid, was advanced and paid by them out of monies belonging to them, upon a joint account in equity, as well as at law, and that the said A. B., C. D., and E. F. are, and shall be considered to remain jointly entitled in equity, as well as at law, to the said sum of £—— and interest, and other the principal monies and interest intended to be hereby secured, and, accordingly, that the receipts of the survivors or survivor of them the said A. B., C. D., and E. F., or of the executors or administrators of such survivor, their or his assigns, shall be effectual discharges for the said sum of £—— and the interest for the same and every part thereof respectively (*c*). AND THE SAID I. K. doth hereby,

Proviso, that, if the interest be once in arrear, the mortgage money may be called in notwithstanding a subsequent acceptance of interest.

Proviso, that the mortgagor shall not compel the mortgagees to accept their money before the time fixed.

Declaration, that the mortgage money belongs to the mortgagees on a joint account.

Covenant by the mortgagor

(*b*) These forms, although not materially differing from those in Vol. III. p. 496—498, have been given at length, as being somewhat simpler.

(*c*) As to this proviso, see infra, Vol. III. p. 480, n. (*b*). It is, however, perhaps, in the present state of practice, desirable to insert the proviso.

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

for himself, his heirs, executors, administrators, and assigns, covenant with the said A. B., C. D., and E. F., their executors, administrators, and assigns, that he the said I. K., his heirs, executors, administrators, or assigns, shall and will at all times, so long as any principal money or interest shall remain on the security intended to be hereby made, keep the said capital messuage, or mansion-house, and all and singular other the buildings and erections hereinbefore released or expressed, and intended so to be, well and sufficiently insured against loss or damage by fire, by a policy or policies of insurance for a sum or sums of money not less in the whole than the sum of £——, and in the names or name of the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, in some office for insurance in London or Westminster, and that he the said I. K., his heirs, executors, administrators, or assigns, shall and will forthwith deposit the said policy or policies with the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, and shall and will from time to time duly and punctually pay all and singular the premium or premiums, duty, and other sums of money necessary for keeping on foot the said policy or policies, and shall and will make such payments on the first or earliest day on which the same respectively ought to be paid for keeping on foot the said policy or policies, and shall and will forthwith deliver the receipt for every such payment unto the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns: AND THAT in case the said I. K., his heirs, executors, administrators, or assigns, shall neglect or refuse to make such payments as aforesaid, or any of them, it shall be lawful for the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, at any time or times, to pay such annual premium or premiums, duty, and other sum and sums of money as aforesaid, so as to keep on foot the said policy or policies of insurance; and in case the same shall not be effected, or shall at any time become void, or shall not continue on foot, then to insure, and keep insured, the said capital messuage, or mansion-house, buildings, and erections in any office or offices for insuring against loss or damage by fire in London or Westminster, in any sum or sums not exceeding £——, and to pay all expenses of effecting such insurance or insurances, and the

to insure against damage by fire;

—and that, on default by the mortgagor, the mortgagees may insure;

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

annual premium or premiums, duty, and sum and sums of money, which shall, from time to time, become payable for keeping on foot such insurance or insurances: AND THAT the said I. K., his heirs, executors, or administrators, shall and will, from time to time, on demand, pay or cause to be paid, unto the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, all and every such sum and sums of money as shall have been paid or advanced by them or him, in or towards payment of any such premium or premiums, duty, sum or sums of money or expenses, with interest for the same, after the rate of £—— per cent. per annum, from the time or respective times of the same having been so advanced or paid, AND THAT, in the meantime, and until such sum or sums of money shall be so repaid, with interest as aforesaid, all and singular the hereditaments and premises hereinbefore released or expressed and intended so to be shall stand and be charged with, and shall not be redeemed or redeemable until full payment shall have been made, as well of such sum or sums of money, and the interest thereon, as of the said principal sum of £——, and the interest thereon: PROVIDED ALSO, and it is hereby agreed and declared, between and by the parties to these presents, and the true intent and meaning of them and of these presents, nevertheless, further is, that it shall be lawful for the said I. K., his heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said hereditaments and premises hereinbefore released, or expressed and intended so to be, and receive and take the rents, issues, and profits thereof, to his and their own use, until default shall be made in payment of the aforesaid sum of £——, or the interest thereof, or some part thereof respectively, contrary to the aforesaid proviso and covenant for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said A. B., C. D., and E. F., or any of them, their or any of their heirs or assigns, or any other persons or person whomsoever, lawfully claiming, or to claim, by, from, or under them or any of them (*d*); AND IT IS

—and that the mortgagor will repay the money paid for such insurance, with interest;

—and that till repayment the same shall be a charge on the mortgaged premises.

Proviso for quiet enjoyment until default.

Power of sale.

(*d*) As to the effect of this proviso, see infra, Vol. III. p. 497, n. (*c*). See, too, *Doe* d. *Roylance* v. *Lightfoot*, 8 Mee. & Wels. 553; *Doe* d. *Lyster* v. *Goldwin*, 1 Gale & Dav. 463; *Wheeler* v. *Montefiore*, 1 Gale & Dav. 493. This precedent ought, perhaps, to contain the usual absolute covenants for title by the purchaser with the mortgagees: they were probably omitted on the ground that the mortgagees already had the benefit of the original mortgagor's covenants.

Effect of proviso for quiet enjoyment until default, in mortgage for a time certain.

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

HEREBY further provided and declared, that it shall be lawful for the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, at any time or times hereafter (*e*), without any further consent on the part of the said I. K., his heirs or assigns, to make sale and dispose of the said hereditaments and premises hereinbefore released or expressed, and intended so to be, or any part or parts thereof, either together or in parcels, and either by public auction or private contract, with full power, upon any such sale or sales, to make any stipulations as to title, or evidence of title, or otherwise, which they or he shall deem necessary, and also with full power to buy in the same premises, or any part or parts thereof, at any sale or sales by public auction, or to rescind any contract or contracts for the sale of the same premises, or any part or parts thereof, and to resell the premises which shall have been so bought in, or as to which any contract or contracts for sale shall have been rescinded as aforesaid, without being responsible for any loss which may be occasioned thereby, and that for the purposes aforesaid, or any of them, it shall be lawful for the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, to make and execute, or cause to be made and executed, all such agreements, deeds, conveyances, and assurances, as they or he shall think fit: AND IT IS HEREBY also agreed and declared, that upon any sale or sales which shall be made under the power of sale hereinbefore contained by the executors or administrators of the survivor of them, the said A. B., C. D., and E. F., or by any person or persons who may not be seised of the legal estate in the premises to be sold, the heirs of such survivor, or any other person or persons, in whom the legal estate of the same premises, or any part thereof, shall be vested, shall make such conveyances and assurances of the same, for the purpose of carrying the sale thereof into effect, as the person or persons by whom the sale shall be made shall direct: PROVIDED

On sale by the executors of the surviving mortgagee, his heir to join.

Power not to

Power of sale in mortgage for a certain time.

(*e*) The ordinary power to sell is only on default of payment of principal or interest on the days appointed; but this language does not very well apply, when the principal is not to be called in for a certain time, if the interest be regularly paid. The subsequent clause, providing that no sale shall be made till after a given default in payment of principal, or till the interest is in arrear for a time specified, affords the mortgagor ample protection against an improper sale.

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

ALSO, and it is hereby agreed and declared, that the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, will not, and shall not execute the power of sale hereinbefore contained, unless and until the said principal sum of £—— shall have become payable, according to the covenants and provisoes in that behalf hereinbefore contained, nor unless and until they, the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, shall have previously given a notice in writing to the said I. K., his heirs, executors, administrators, or assigns, to pay off the monies which, for the time being, shall be due or owing on the security of these presents, or left a notice in writing to that effect at the office of —— in ——, and default shall have been made in payment of such monies, or some part thereof, for the space of six calendar months from the time or respective times of giving or leaving such notice, or unless and until some half-yearly payment of interest which shall become due on the security of these presents, or a part of some such half-yearly payment, shall have become in arrear for the space of three calendar months after the day on which the same shall become due: PROVIDED ALSO, and it is hereby agreed and declared, that upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers shall not be bound to inquire whether any of the cases mentioned in the clause or proviso lastly hereinbefore contained has happened, nor whether any money remains due upon the security of these presents, nor as to the necessity or expediency of the stipulations subject to which such sale shall have been made, nor otherwise as to the propriety or regularity of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as regards the safety and protection of the purchaser or purchasers, be deemed and taken to be within the aforesaid power in that behalf, and be valid and effectual accordingly; and the remedy of the said I. K., his heirs or assigns, in respect of any breach of the clause or proviso lastly hereinbefore contained, or of any impropriety or irregularity in any such sale, shall be in damages only: AND IT IS HEREBY also agreed and declared, that upon any such sale as aforesaid, the receipt or receipts in writing of the said A. B., C. D., and E. F., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, for the

be exercised till after certain events.

Purchaser not to be bound to see that such events have happened.

Receipts of the mortgagees to be discharges.

CONVEYANCE SUBJECT TO A FIRST MORTGAGE.

purchase-money of the premises to be sold, shall be an effectual discharge, or effectual discharges, to the purchaser or purchasers, for the money therein respectively expressed to be received; and that such purchaser or purchasers, after payment of his or their purchase-money, shall not be concerned to see to the application of such money, nor be answerable for any loss, misapplication, or non-application thereof: AND IT IS HEREBY further agreed and declared, that the said A. B., C. D., and E. F., and the survivors and survivor of them, and the executors or administrators of such survivor, their or his assigns, shall hold all and singular the monies which shall arise from any sale which shall be made in pursuance of the aforesaid power, in that behalf, upon the trusts following; (that is to say), UPON TRUST, in the first place, by, with, or out of the same monies, to reimburse themselves, or himself, or pay or discharge all the costs and expenses attending such sale or sales, or otherwise to be incurred in or about the exercise of the said power of sale, or in anywise relating thereto, or otherwise, in respect of the premises; And, in the next place, upon trust to apply such monies in or towards satisfaction of all and singular the monies which, for the time being, shall be due or owing on the security of these presents; And then, upon trust to pay the surplus (if any) of the same monies which shall arise from any such sale as aforesaid, to the said I. K., his heirs and assigns, for his and their own use and benefit: AND IT IS HEREBY also agreed and declared, that the aforesaid power of sale shall and may be exercised by any person and persons who, for the time being, shall be entitled to receive, and give a discharge for the monies which, for the time being, shall be due or owing on the security of these presents: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said A. B., C. D., and E. F., or any of them, their or any of their executors, administrators, or assigns, shall not be answerable or accountable for any involuntary losses which may happen in or about the exercise and execution of the aforesaid power and trusts, or any of them: PROVIDED ALSO, and it is hereby lastly agreed and declared, that the aforesaid power of sale, or anything herein contained, shall not in anywise prejudice or affect the right of the said A. B., C. D., and E. F., or of the survivors or survivor of them, or of the heirs, executors, or administrators of such survivors, their or his assigns, to foreclose the equity of redemption of the premises aforesaid, or of the unsold part thereof for the time being. IN WITNESS &c.

Trusts of purchase money.

Power to be exercised by any person entitled to the purchase-money.

Mortgagees not to be liable for involuntary losses.

Power of sale not to affect the right of foreclosure.

III.

CONVEYANCE *of* FREEHOLDS *and* LEASEHOLDS, *by a* MARRIED WOMAN (TENANT *for* LIFE *for her* SEPARATE USE) *and her* TRUSTEES; *by the* TRUSTEE *of a* TERM *of Years in the Freehold; and by the* REVERSIONER; *by the* DIRECTION *of a* PURCHASER, *to* MORTGAGEES *in* FEE *of the Freeholds, and of the* WHOLE TERM *in the Leaseholds.* USUAL PROVISOES *and* COVENANTS (*including Covenants for* RENEWAL *of the* LEASES) *and* POWER OF SALE.

THIS INDENTURE, made &c., BETWEEN A. B., of &c., and C. D., of &c., [*trustees for the separate use of G. H., a married woman*], of the first part; E. F., of &c., [*trustee of a term of —— years for raising certain sums of money*], of the second part; G. H., of &c., [*the married woman* (*a*)] of the third part; I. K., of &c., [*the owner of the inheritance in reversion*], of the fourth part; L. M., of &c., [*the purchaser*], of the fifth part; and N. O., of &c., P. Q., of &c., and R. S., of &c., [*the mortgagees*], of the sixth part; [*recitals, shewing, that, under the will of X. Y., and a marriage settlement, a freehold messuage and hereditament stand limited to the use of A. B. and C. D., their executors, administrators, and assigns, for the life of G. H., for her separate use; with remainder to the use of E. F., for a term of* 1000 *years, in trust, by sale or otherwise, to raise certain sums of money, and with power to give receipts, and subject thereto to I. K., his heirs and assigns, and that, by virtue of the same will and settlement, certain leasehold hereditaments are vested in A. B. and C. D., for the life of G. H., for her separate use, and subject thereto, belong to I. K.*]: AND WHEREAS the said G. H. hath contracted and agreed with the said L. M. for the absolute sale to him of all the estate, right, title, and interest of her the said G. H., as devisee, under the will of the said X. Y., of, in, to, and out of the said mansion and dwelling-house, land, and hereditaments hereinafter more particularly mentioned and intended to be hereby released, and the appurtenances, free from in-

Parties.

Recitals of title;

—of the contract for sale of the life estate in the freeholds;

(*a*) When property is settled to the separate use of a married woman, it is unnecessary and improper to make her husband a party to any deed affecting it.

FREEHOLDS AND LEASEHOLDS.

cumbrances, at or for the price or sum of £——: AND WHEREAS the said E. F., as the trustee of the said term of 1000 years, created by the said will of the said X. Y., as hereinbefore is mentioned, and for the purposes thereof, and the said I. K., have contracted and agreed with the said L. M. for the sale to him of the fee simple and inheritance in reversion or remainder expectant upon the determination of the life estate of the said G. H. of and in the said mansion and dwelling-house, land, and hereditaments hereinafter particularly mentioned and intended to be hereby released, and the appurtenances, free from incumbrances, at or for the price or sum of £ ——: AND WHEREAS, upon the treaty for the said last-mentioned sale, it was agreed that the whole of the said purchase-money, or sum of £ ——, should be paid to the said E. F., as trustee of the said term of 1000 years, created by the said will of the said X. Y., and for the purposes thereof: AND WHEREAS the said G. H. and I. K. have contracted and agreed with the said L. M. for the absolute sale to him of the said piece or parcel of ground, stable, coach-house, and other the premises comprised in the said indenture of lease of the —— day of ——, with the appurtenances, for the residue now to come of the said term of —— years, with the benefit of the said covenant for renewal, free from incumbrances, (except as hereinafter mentioned), at or for the price or sum of £ ——: AND WHEREAS, the said N. O., P. Q., and R. S. have agreed to advance and pay the several sums of £ ——, £ ——, and £ ——, amounting together to the sum of £ ——, on account of the said L. M., upon having the repayment of the same, with interest after the rate of £ —— per cent. per annum, secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreements, and in consideration of the sum of £ —— to the said G. H., at or immediately before the sealing and delivery of these presents, at the request and by the direction of the said L. M., (testified by his being a party to and executing these presents), paid by the said N. O., P. Q., and R. S., (the receipt of which said sum of £ —— she the said G. H. doth hereby acknowledge, and from the same and every part thereof doth acquit, release, and discharge as well the said N. O., P. Q., and R. S., and each of them, their and each of their heirs, executors, administrators, and assigns, as the said L. M., his heirs, executors, administrators, and assigns, for ever, by these presents), and

—of the contract for sale by the termor and reversioner;

—of the agreement that the whole of the last-mentioned purchase-money should be paid to the trustee of the term;

—of the contract for sale of the leaseholds;

—of the agreement for the mortgage.

Witnesseth.

Considerations and receipts.

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also, in consideration of the sum of £——, to the said E. F., at the same time, at the request and by the direction of the said L. M., and with the privity and approbation of the said I. K., (testified by their respectively being parties to, and executing these presents), paid by the said N. O., P. Q., and R. S., (the receipt and payment of which said sum of £——, they the said E. F. and I. K. do hereby respectively acknowledge, and from the same and every part thereof do, and each of them doth, acquit, release, and discharge, as well the said N. O., P. Q., and R. S., and each of them, their and each of their heirs, executors, administrators, and assigns, as the said L. M., his heirs, executors, administrators, and assigns, for ever, by these presents (*b*)), they, the said A. B. and C. D., according to their estate and interest, and by the direction and appointment of the said G. H., (testified by this deed or writing, by her sealed and delivered), and at the request of the said L. M., (testified as aforesaid), do, and each of them doth, by these presents, (made in pursuance of an act, &c. *See infra, Vol. V. p.* 266), release, and the said G. H., according to her estate and interest, and at the request of the said L. M., (testified as aforesaid), doth by these presents, (made in pursuance of the act aforesaid), grant, release, and confirm, and the said E. F., at the request of the said L. M., and with the privity and approbation of the said I. K., (testified as aforesaid), and to the intent that the said term of 1000 years, created by the said will of the said X. Y., as aforesaid, in the said hereditaments hereinafter particularly mentioned, and intended to be hereby released, may be merged and extinguished, in the reversion, freehold, and inheritance of the same hereditaments, doth, by these presents, assign and surrender, and the said I. K., according to his estate and interest, and at the request of the said L. M., (testified as aforesaid), doth, by these presents, (made in pursuance of the act aforesaid), grant, release, and confirm, and the said L. M. doth, by these presents, remise and confirm unto the said N. O., P. Q., and R. S., their heirs and assigns, ALL THAT [*Parcels—General words*], AND ALL THE ESTATE, &c.; TO HAVE AND TO HOLD the said messuage or mansion-house, ground, and hereditaments, and all and

Conveyance of the freehold by the direction of the purchaser to the mortgagees.

Habendum to mortgagees, subject to redemption.

(*b*) The consideration for the sale of the leasehold is stated in the subsequent witnessing part, as the title to the leaseholds is altogether different from that of the freeholds; a case in which the general rule (infra, Vol. III. p. 259, n. (*e*)) does not apply.

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singular other the premises, hereinbefore granted and released, or expressed and intended so to be, unto the said N. O., P. Q., and R. S., their heirs and assigns, TO THE USE of the said N. O., P. Q., and R. S., their heirs and assigns, for ever, SUBJECT, NEVERTHELESS, to the proviso or condition, hereinafter contained for redemption of the same: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreements, and in consideration of the payment by the said N. O., P. Q., and R. S., of the said sums of £——, and £——, at the request of the said L. M. as aforesaid, and in consideration of the sum of £——, to the said G. H. and I. K., at or immediately before the sealing and delivery of these presents, at the request of the said L. M., (testified as aforesaid), paid by the said N. O., P. Q., and R. S., for the purchase of the said leasehold premises, (the receipt of which said sum of £——, they the said G. H. and I. K. do hereby acknowledge, and from the same and every part thereof do, and each of them doth, acquit, release, and discharge, as well the said N. O., P. Q., and R. S., and each of them, their and each of their heirs, executors, administrators, and assigns, as the said L. M., his executors, administrators, and assigns for ever, by these presents), they, the said A. B. and C. D., according to their estate and interest, and by the direction and appointment of the said G. H., (testified by this deed or writing by her sealed and delivered), do, and each of them doth, by these presents, assign, and the said G. H. and I. K., at the request of the said L. M., (testified as aforesaid), and according to their respective estates and interest, do, and each of them doth, by these presents, assign and confirm, and the said L. M. doth by these presents remise, and confirm, unto the said N. O., P. Q., and R. S., their executors, administrators, and assigns, the said piece or parcel of ground, with the stables, coach-houses, buildings, and hereditaments, and all and singular the premises in and by the said indenture of the —— day of —— [*the lease*], demised or expressed to be demised, with the rights, easements, and appurtenances, TOGETHER with the full benefit of the said covenant for renewal, AND ALL THE ESTATE, &c.; TO HAVE AND TO HOLD the said piece or parcel of ground, and all and singular other the premises hereinbefore assigned or expressed, and intended so to be, unto the said N. O., P. Q., and R. S., their executors, administrators, and assigns, henceforth for the residue now to come of the

Witnesseth further.

Consideration.

Receipt.

Assignment of the leaseholds, by the direction of the purchaser, to the mortgagees.

Habendum to the mortgagees, subject to redemption.

said term of —— years, SUBJECT, NEVERTHELESS, to the proviso or condition hereinafter contained for redemption of the same. AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreements and in consideration of the payment, by the said N. O., P. Q., and R. S., of the said several sums of £——, £——, and £——, at the request of the said L. M. as hereinbefore is mentioned, (and the payment of which said several sums of £——, £——, and £——, making together the sum of £——, as hereinbefore is mentioned, he the said L. M. doth hereby acknowledge, and from the same and every part thereof doth acquit, release, and discharge the said N. O., P. Q., and R. S., and each of them, their and each of their heirs, executors, administrators, and assigns, for ever, by these presents), He the said L. M. doth hereby for himself, his heirs, executors, and administrators, covenant with the said N. O., P. Q., and R. S., their executors, and administrators, &c. [*Covenant to pay the principal money and interest, supra, p.* 511]: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said N. O., P. Q., and R. S., and the said L. M., and the true intent and meaning of them and of these presents nevertheless is, that if the said L. M., his heirs, executors, administrators, or assigns, shall pay or cause to be paid to the said N. O., P. Q., and R. S., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, the aforesaid sum of £—— in the parts, shares, and proportions and on or at the days or times in the covenant hereinbefore contained mentioned for the payment thereof, without any deduction or abatement whatsoever as aforesaid, according to the true intent and meaning of these presents, then and in such case they the said N. O., P. Q., and R. S., or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns, shall and will, at any time after such payment shall have been so made as aforesaid, upon the request and at the costs and charges of the said L. M., his heirs executors, administrators, or assigns, convey the said hereditaments and premises hereinbefore granted and released, or expressed and intended so to be, unto the said L. M., his heirs or assigns, or as he or they shall in that behalf order or direct, and assign the said hereditaments and premises hereinbefore assigned, or expressed and intended so to be, unto the said L. M., his executors, administrators, or assigns, or as he or they shall in that behalf

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Witnesseth further consideration and receipt between mortgagor and mortgagee, and covenant by mortgagor with mortgagees, for payment of principal and interest.

Proviso for redemption.

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order or direct, for the residue which shall be then unexpired of the said term of —— years, or of any renewed term which may be granted in the same premises, free from all incumbrances whatever made, done, or committed by the said N. O., P. Q., and R. S., or any of them, their or any of their heirs, executors, administrators, or assigns, so as, for the doing thereof, the said N. O., P. Q., and R. S., or any of them, their or any of their heirs, executors, administrators, or assigns, be not compelled or obliged to go or travel from the place or places of their or any of their usual abode or dwelling.

Covenant by mortgagor with mortgagees for payment of interest, if the principal be not paid at the time fixed.

AND THE SAID L. M. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said N. O., P. Q., and R. S., their executors and administrators. [*Covenant for payment of interest, supra, p.* 512]:

Proviso, that the mortgage-money was advanced on a joint account, and that the receipts of the survivors shall be discharges.

PROVIDED ALWAYS, and it is hereby agreed and declared, that the said sum of £—— so advanced and paid by the said N. O., P. Q., and R. S., as aforesaid, was advanced and paid by them out of monies belonging to them upon a joint account in equity as well as at law, and that the said N. O., P. Q., and R. S. are and shall be considered to remain jointly entitled in equity as well as at law to the sum of £—— and interest intended to be hereby secured, and accordingly that the receipts of the survivors or survivor of them the said N. O., P. Q., and R. S., or the executors or administrators of such survivor, or of their or his assigns, shall be effectual discharges for the said sum of £——, and the interest for the same and every part thereof respectively.

Covenants by the trustees against incumbrances.

AND EACH OF THEM THE SAID A. B., C. D., and E. F., so far as relates to his own acts and deeds only, doth hereby, for himself, his heirs, executors, and administrators, covenant with the said N. O., P. Q., and R. S., their heirs and assigns, that they the said A. B., C. D., and E. F. respectively have not at any time heretofore made, done, committed, or executed, or knowingly or willingly permitted or suffered, or been party or privy to any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof they the said A. B., C. D., and E. F. respectively are in anywise prevented or hindered from releasing, the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any of them, or any part thereof, or whereby or by reason or means whereof the same hereditaments and premises, or any of them, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or incumbered in title, estate, or otherwise howsoever. AND EACH OF THEM

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THE SAID A. B., C. D., and E. F., so far, &c. [*Similar covenant with the mortgagees,* "their executors, administrators, and assigns," *as to the leaseholds and the assignment thereof.*] AND THE SAID I. K. doth hereby for himself, his heirs, executors, and administrators, covenant with the said N. O., P. Q., and R. S., their heirs, executors, administrators, and assigns respectively, in manner following, (that is to say), THAT for and notwithstanding any act, deed, matter, or thing by him the said I. K., or the said G. H. (*c*), or the said X. Y., or any other of the ancestors of him the said I. K., made, done, committed, or knowingly or willingly suffered to the contrary, the said indenture of the —— day of —— at the time of the sealing and delivery of these presents is a good, valid, and effectual lease in the law, of the said piece or parcel of ground and other hereditaments and premises therein comprised, and is in full force, unforfeited and unsurrendered, and in nowise become void or voidable; AND THAT all and singular the rents, covenants, and agreements, in and by the said indenture of the —— day of —— reserved and contained, and on the part of the lessee to be paid, observed, and performed, have been paid, observed, and performed, up to the day of the date of these presents; AND THAT for and notwithstanding any such act, deed, matter, or thing as aforesaid, they the said A. B., C. D., E. F., G. H. and I. K., now have in themselves respectively good right, full power, and lawful and absolute authority to grant, release, surrender, and confirm the said hereditaments and premises hereinbefore granted, released, surrendered, and confirmed, or expressed and intended so to be, unto them the said N. O., P. Q., and R. S., their heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents; AND THAT they the said A. B., C. D., E. F., G. H., and I. K., now have in themselves respectively good right, full power, and lawful and absolute authority to assign and confirm the said hereditaments and premises hereinbefore assigned and confirmed, or expressed and intended so to be, unto the said N. O., P. Q., and R. S., their executors, administrators, and assigns, for all the residue now to come of the said term of —— years, and with the benefit of the said covenant for renewal in manner aforesaid, according to the true intent and meaning of these presents; AND THAT it shall be lawful

Covenants for title by the vendor with the mortgagees;

—that the lease is good;

—and the rent and covenants have been paid and performed up to the date of the conveyance;

—for right to convey,

—and assign;

—for quiet enjoyment;

(*c*) G. H., being a married woman, is unable to enter into covenants; the covenants of the reversioner are therefore (by agreement) made to extend to her interest.

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for the said N. O., P. Q., and R. S., their heirs, executors, administrators, and assigns, from time to time and at all times peaceably and quietly to enter into and upon, and to have, hold, occupy, possess, and enjoy the said hereditaments and premises hereinbefore released and assigned respectively, or expressed and intended so to be, and to receive and take the rents, issues, and profits thereof, and of every part thereof, to and for their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of, from, or by the said G. H., her executors, administrators, or assigns, or the said I. K., his heirs, executors, administrators, or assigns, or any other person or persons lawfully or equitably claiming or to claim by, from, through, under, or in trust for them, or any of them, or by, from, through, or under the said X. Y., or any other of the ancestors of the said I. K.; AND THAT free and clear, and freely and clearly and absolutely acquitted, exonerated, and released, or otherwise, by the said I. K., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified from and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or to be hereafter had, made, executed, occasioned, or suffered by the said G. H., her executors, administrators, or assigns, or the said I. K., his heirs, executors, or administrators, or any person or persons lawfully or equitably claiming or to claim by, from, through, under, or in trust for them, or any of them, or by, from, or under the said X. Y., or any other of the ancestors of the said I. K. AND MOREOVER, that they the said A. B., C. D., E. F., G. H., and I. K., and every of them, their and every of their heirs, executors, administrators, and assigns, and all and every other persons and person whosoever having or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim any estate right, title, interest, claim, or demand whatsoever, of, in, to, or out of the said hereditaments and premises hereinbefore released, and assigned respectively, or expressed and intended so to be, or any of them, or any part or parts thereof, by, from, under, or in trust for the said A. B., C. D., E. F., G. H., and I. K., or any of them, or by, from, or under the said X. Y., or any other of the ancestors of the said I. K., shall and will from time to time and at all times hereafter, upon every reasonable re-

—free from incumbrances;

—and for further assurance.

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quest to be made for that purpose by the said N. O., P. Q., and R. S., or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns, or of the said L. M., his heirs, executors, administrators, or assigns, at the proper costs and charges in the law of the said L. M., his heirs executors, administrators, or assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all and every such further and other lawful acts, deeds, things, devices, conveyances, assignments, surrenders, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, conveying, surrendering, and assuring all the said hereditaments and premises hereinbefore released, or expressed and intended so to be, unto and to the use of the said N. O., P. Q., and R. S., their heirs and assigns, and assigning and assuring the said hereditaments and premises hereinbefore assigned, or expressed and intended so to be, unto the said N. O., P. Q.. and R. S., their executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents, as by the said N. O., P. Q., and R. S., or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns, or the said L. M., his heirs, executors, administrators, or assigns, or their or his counsel in the law, shall be reasonably devised or advised and required: AND THE SAID L. M. doth hereby for himself, his heirs, executors, and administrators, covenant with the said A. B. and C. D., their executors and administrators, and also, as a separate covenant, with the said I. K., his executors and administrators (*d*), that he the said L. M., his executors, administrators, or assigns shall and will henceforth from time to time, and at all times during the residue now to come of the said term of —— years, pay the said yearly rent of £—— by the said indenture of the —— day of —— reserved, and henceforth to become payable, and observe and perform all and every the covenants, conditions, and agreements in the same indenture contained, and on the part of the lessee, his executors, administrators, or assigns, from henceforth to be observed and performed; AND SHALL and will from time to time and at all times hereafter save, defend, keep harmless, and indem-

Covenant by the purchaser with the vendors to pay the rents, and perform the covenants of the leaseholds;

—and indemnify the

(*d*) This covenant must be entered into with the owners of the legal estate, as they are the persons liable to the rent and covenants.

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vendors in respect thereof.

nified, the said A. B. and C. D., and each of them, their and each of their heirs, executors, and administrators, estates and effects, and also the said I. K., his heirs, executors, and administrators, estate and effects, from and against all actions, suits, damages, costs, expenses, claims, and demands, for or by reason or on account of the non-payment of the said rent, or any part thereof, or the breach or non-observance or non-performance of the said covenants, conditions, or agreements, or any of them: AND THE SAID L. M. doth hereby for himself, his heirs, executors, and administrators, covenant with the said N. O., P. Q., and R. S, their heirs, executors, administrators, and assigns respectively, in manner following, (that is to say), THAT if default shall be made in payment of the said sum of £——, or any part thereof, contrary to the aforesaid covenant for payment of the same, and the true intent and meaning of these presents, then and in such case it shall be lawful for the said N. O., P. Q., and R. S., their heirs, executors, administrators, and assigns respectively, at any time or times thereafter, into and upon all and every the said hereditaments and premises hereinbefore released and assigned respectively, or expressed and intended so to be, or any part or parts thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, possess, and enjoy, and receive and take the rents, issues, and profits thereof, to and for their own use, without any let, suit, trouble, eviction, interruption, or disturbance whatsoever, of, from, or by the said L. M., his heirs, executors, administrators, or assigns, or any other person or persons whomsoever, any estate, right, title, or interest, having or lawfully or equitably claiming, or to have or lawfully or equitably claim in, to, or out of the said hereditaments and premises, or any of them, or any part or parts thereof, but nevertheless, as to the said leasehold hereditaments and premises, subject to the rent, conditions, covenants and agreements in the said indenture of the —— day of —— reserved and contained, and on the part of the lessee, his executors, administrators, and assigns, to be paid, observed, and performed; AND THAT free and clear, and freely and clearly, and absolutely acquitted, exonerated, and discharged, or otherwise, by the said L. M., his heirs, executors, or administrators, saved, protected, kept harmless, and indemnified, from and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever; AND MOREOVER, that he the said L. M.,

Covenants for title by the purchaser with the mortgagees;

—for quiet enjoyment after default;

—free from incumbrances;

—and for

his heirs, executors, and administrators, and all and every other persons and person whosoever, having or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim, any estate, right, title, or interest, claim, or demand whatsoever, of, in, or to the said hereditaments and premises hereinbefore released and assigned respectively, or expressed and intended so to be, or any of them, or any part or parts thereof, shall and will from time to time and at all times hereafter, upon the request of the said N. O., P. Q., and R. S., or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns, but at the costs and charges of the said L. M., his heirs, executors, or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful acts, deeds, matters, things, conveyances, assignments, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, conveying, and assuring all the said hereditaments hereinbefore released, or expressed and intended so to be, unto and to the use of the said N. O., P. Q., and R. S., their heirs and assigns, and assigning and assuring the said hereditaments and premises hereinbefore assigned, or expressed and intended so to be, unto the said N. O., P. Q., and R. S., their executors, administrators, and assigns, for the residue then to come of the said term of—— years, or of any such renewed term as aforesaid, in manner aforesaid, according to the true intent and meaning of these presents, as by the said N. O., P. Q., and R. S., or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns, or their or his counsel in the law, shall be reasonably devised or advised and required; AND ALSO, that he the said L. M., his executors and administrators, shall and will from time to time and at all times, so long as the said principal sum of £——, and the interest thereon, or any part thereof respectively, shall remain due or owing on the security of these presents, pay, observe, and perform, or cause to be paid, observed, and performed, as well all and singular the rents, covenants, and agreements in and by the said indenture of the —— day of —— reserved and contained, and on the part of the lessee, his executors, administrators, or assigns, to be paid, observed, and performed, as all and singular the rents, covenants, and agreements which shall in and by any lease or leases to be at any time or times hereafter granted of the

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further assurance;

—for payment of rents and performance of covenants;

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said hereditaments and premises comprised in the same indenture, be reserved and contained, and on the part of the lessee or lessees to be paid, observed, and performed; AND ALSO, save, defend, keep harmless, and indemnified the said N. O., P. Q., and R. S., their executors, administrators, and assigns, and every of them, from and against all actions, suits, proceedings, costs, charges, damages, and expenses whatsoever, (if any), which shall or may be incurred or sustained by reason or on account of the non-payment or non-performance of the same respectively, or any act, matter, or thing whatsoever, touching or concerning the same respectively in anywise howsoever; AND ALSO, that he the said L. M., his executors or administrators, shall and will from time to time so long as the said principal sum of £——, or any interest for the same, or any part thereof respectively, shall remain due or owing on the security of these presents, at his or their proper costs and charges, procure the present lease and any renewed lease or leases which may be hereafter obtained of the said hereditaments and premises hereinbefore assigned, or expressed and intended so to be, to be renewed for a further term of —— years, pursuant to the said covenant in that behalf in the said indenture of the —— day of —— contained, or in any similar covenant, or to be contained in any future lease of the same premises, (they the said N. O., P. Q., and R. S., their executors, administrators, and assigns, doing or joining in doing all other such reasonable acts as may be necessary or expedient for the procuring of such renewal or renewals); AND ALSO, that he the said L. M., his executors or administrators, shall and will, immediately upon every such renewal, well and effectually assign and assure the said hereditaments and premises comprised in such renewed lease or leases unto the said N. O., P. Q., and R. S., their executors, administrators, and assigns, or to such other person or persons as the said N. O., P. Q., and R. S., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, shall direct, for all such term or terms of years as shall be granted by any such renewed lease or leases respectively, but subject nevertheless to such right or equity of redemption as shall or may be subsisting in the said hereditaments and premises under or by virtue of these presents; AND THAT, if the said L. M., his executors, administrators, or assigns, shall neglect or refuse to renew such lease or leases as aforesaid, and to pay the fines, fees, and other charges

—and to indemnify the mortgagees;

—and to obtain renewed leases of the leaseholds;

—and subject them to the mortgage;

—and that, on neglect by the mortgagor, the

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and expenses incident to and payable upon the renewal thereof, then and so often as it shall so happen, it shall be lawful for the said N. O., P. Q., and R. S., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, to renew such lease or leases in his or their own names or name, or in the name or names of such other person or persons as they or he shall direct, and in that case all and every such new lease or leases, and the premises thereby to be demised, shall stand and be a security to the said N. O., P. Q., and R. S., and the survivors and survivor of them, and the executors and administrators of such survivor, their and his assigns, as well for the payment of all and every such sum and sums of money as shall be advanced and paid by them or him for the fines, fees, charges, and expenses of every such renewal, with interest for the same at the rate aforesaid, from the time of their or his advancing or paying the same respectively, as for the payment of the said principal sum of £——, and the interest thereon, or such part thereof respectively, as shall then remain due or owing on the security of these presents: PROVIDED ALWAYS, that the total amount of the money secured by these presents, or to be ultimately recoverable hereupon, shall not exceed the sum of £——(*e*): PROVIDED ALSO, and it is hereby agreed and declared between and by the said N. O., P. Q., and R. S,, and the said L. M., and the true intent and meaning of them and of these presents nevertheless is, that it shall be lawful for the said L. M., his heirs, executors, administrators, and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said hereditaments and premises hereinbefore released, and assigned respectively, or expressed and intended so to be, and to receive and take the rents, issues, and profits thereof, for his and their own use until default shall be made in payment of the said sum of £——, or some part thereof, contrary to the aforesaid covenant and proviso for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said N. O., P. Q., and R. S., their heirs, executors, administrators, or assigns, or by any other person or persons whomsoever, lawfully or equitably claiming or to claim by, from, or under them, or any of them. [*Covenant to insure against loss by fire, supra, p.* 514.]

mortgagees may renew and hold as a security for the mortgage debt and the costs of renewal.

Total amount secured not to exceed £——.

Proviso for quiet enjoyment by the purchaser till default.

(*e*) See infra, Vol. III. p. 563, n. (*f*), as to the renewal of leases in mortgage.

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Power of sale.

AND IT IS HEREBY further provided and declared, that if default shall be made in payment of the said principal sum of £——, or the interest thereon, or any part thereof respectively, at the times hereinbefore appointed for the payment of the same respectively, it shall be lawful for the said N. O., P. Q. and R. S., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, at any time or times after such default shall have been so made, without any further consent on the part of the said L. M., his heirs, executors, administrators, or assigns, to make sale and dispose of the said mansion-house or messuage, land, ground, hereditaments, and premises hereinbefore released and assigned respectively, or expressed and intended so to be, or any part or parts thereof, either together or in parcels, and either by public auction or private contract, with full power upon any such sale or sales to make any stipulations as to title or evidence of title or otherwise, which they or he shall deem necessary; AND ALSO, with full power to buy in the same premises, or any part or parts thereof, at any sale or sales by public auction, or to rescind any contract or contracts for the sale of the same premises or any part thereof, and to re-sell the premises which shall have been so bought in, or as to which any contract or contracts for sale shall have been rescinded as aforesaid, without being responsible for any loss which may be occasioned thereby; AND THAT for the purposes aforesaid or any of them, it shall be lawful for the said N. O., P. Q., and R. S., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, to make and execute, or cause to be made and executed all such agreements, deeds, conveyances, assignments, and assurances, as they or he shall think fit; AND IT IS HEREBY also agreed and declared, that, upon any sale or sales which shall be made of the said hereditaments and premises hereinbefore released, or expressed and intended so to be, or any of them, under the power of sale hereinbefore contained, by the executors or administrators of the survivor of them, the said N. O., P. Q., and R. S., or by any other person or persons, who may not be seised of the legal estate in the premises to be sold, the heirs of such survivor, or any other person or persons in whom the legal estate of the same premises, or any part thereof shall be vested, shall make such conveyances and assurances of the same, for the purpose of carrying the sale thereof into effect, as

On a sale of the freeholds by the executors or administrators of a surviving mortgagee, his heirs to convey the legal estate.

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the person or persons by whom the sale shall be made shall direct (*f*): PROVIDED ALSO, and it is hereby agreed and declared, that the said N. O., P. Q., and R. S., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, will not and shall not execute the power of sale hereinbefore contained, unless and until they or he shall have previously given a notice in writing to the said L. M., his heirs, executors, administrators, or assigns, to pay off the monies which, for the time being, shall be due on the security of these presents, or left a notice in writing to that effect at the office of ——, in ——, and default shall have been made in payment of such monies or some part thereof, for the space of six calendar months from the time of giving or leaving such notice, or unless and until some half-yearly payment of interest, which shall become due on the security of these presents, or a part of some such half-yearly payment, shall have become in arrear for the space of three calendar months after the day on which the same shall become due: PROVIDED ALSO, and it is hereby agreed and declared, that upon any sale, purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers shall not be bound to see or inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or whether any money remains due on the security of these presents, or as to the necessity or expediency of the stipulations, subject to which such sale shall have been made, or otherwise as to the propriety or regularity of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as far as regards the safety and protection of the purchaser or purchasers, be deemed and taken to be within the

Power not to be exercised till certain events have happened.

Purchaser not to be bound to see that such events have happened.

(*f*) If the mortgage of the leaseholds had been by demise, the following clause would have been inserted here; see infra, Vol. III. p. 550, n. (*h*).

"AND THAT after any sale or sales shall have been made under the said power of sale of the said hereditaments and premises hereinbefore assigned, or expressed and intended so to be, or any of them, he the said L. M., his executors, administrators, and assigns, shall and will stand and be possessed of and interested in the said —— last days of the said term of —— years upon trust for the purchaser or purchasers of the premises comprised in the said term hereby granted, and to assign and dispose of the same as such purchaser or purchasers shall direct."

FREEHOLDS AND LEASEHOLDS.

aforesaid power in that behalf, and to be valid and effectual accordingly, and the remedy of the said L. M., his heirs, executors, administrators, or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, or of any impropriety or irregularity whatsoever in the said sale, shall be in damages only; AND IT IS HEREBY also agreed and declared, that upon any such sale as aforesaid, the receipt or receipts in writing of the said N. O., P. Q., and R. S., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, for the purchase-money of the premises to be sold, shall be an effectual discharge or effectual discharges to the purchaser or purchasers for the money therein respectively expressed to be received, and that such purchaser or purchasers, after payment of his or their purchase-money, shall not be concerned to see to the application of such money, or be answerable for any loss, misapplication, or non-application thereof; AND IT IS HEREBY further agreed and declared, that the said N. O., P. Q., and R. S., and the survivors and survivor of them, and the executors and administrators of such survivor, their and his assigns, shall hold all and singular the monies which shall arise from any sale which shall be made in pursuance of the aforesaid power in that behalf, upon the trusts following, (that is to say) UPON TRUST in the first place by, with, or out of the same monies, to reimburse themselves or himself, or pay or discharge all the costs and expenses attending such sale or sales, or otherwise to be incurred in or about the exercise of the said power of sale, or in anywise relating thereto, or otherwise in respect of the premises; and, in the next place, upon trust to apply such monies in or towards satisfaction of all and singular the monies, which for the time being shall be due or owing on the security of these presents, and then upon trust to pay the surplus (if any) of the said monies, which shall arise from any such sale as aforesaid, unto the said L. M., his executors, administrators, or assigns, for his and their proper use and benefit, and as personal estate (*g*); AND IT IS HEREBY also agreed and declared, that the aforesaid power of sale shall and may be exercised by any person or persons who, for the time being, shall be

Receipts of the mortgagees to be discharges.

Trusts of the purchase-money.

Power to be exercised by any person entitled to the purchase-money.

(*g*) As the property is partly freehold, and partly leasehold, and will probably be sold at one entire price for all, the duty of apportioning the surplus must not be thrown on the mortgagees. Hence, the whole surplus is directed to be paid as personal estate. See infra, Vol. III. p. 477, n. (*p*).

entitled to receive and give a discharge for the monies which, for the time being, shall be due or owing on the security of these presents: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said N. O., P. Q., and R. S., or any of them, their or any of their executors, administrators, or assigns, shall not be answerable or accountable for any involuntary losses which may happen in or about the exercise or execution of the aforesaid power and trusts, or any of them: PROVIDED ALSO, and it is hereby lastly agreed and declared, that the aforesaid power of sale or anything herein contained shall not in anywise prejudice or affect the right of the said N. O., P. Q., and R. S., or of the survivors or survivor of them, or of the heirs, executors, or administrators of such survivor, their or his assigns, to foreclose the equity of redemption of the premises aforesaid, or of the unsold part thereof for the time being. IN WITNESS &c.

FREEHOLDS AND LEASEHOLDS.

Mortgagees not to be liable for involuntary losses.

Power of sale not to affect the right of foreclosure.

IV.

MORTGAGE *of an* ESTATE *for* LIFE, *and of* POLICIES *of Assurance on the* LIFE *of the* MORTGAGOR.

OF LIFE ESTATE AND POLICIES.

THIS INDENTURE, made, &c., BETWEEN A. B., of &c., [*mortgagor*] of the one part, and C. D., of &c., [*mortgagee*] of the other part. WHEREAS, under and by virtue of the last will and testament of X. Y., late of &c., deceased, bearing date the —— day of ——, the said A. B. is seised of, or well and sufficiently entitled to the manors or lordships, messuages, tenements, lands, tithes, moduses, and hereditaments hereinafter particularly mentioned or referred to, and intended to be hereby granted and demised, with the appurtenances, for an estate for his life in possession, subject to several annuities, mortgages, charges, and incumbrances affecting the same, and which are specified in the second schedule hereunder written or hereunto annexed; AND WHEREAS the said C. D. has agreed to advance and lend to the said A. B. the sum of £——, upon having the repayment thereof, with interest after the rate hereinafter mentioned, secured in manner hereinafter appearing; AND WHEREAS, as part of

Parties.

Recital of mortgagor's title to his life estate;

—of the agreement for the mortgage;

—of the mort-

OF LIFE ESTATE AND POLICIES.

gagee having effected one assurance on the life of the mortgagor; —and a second.

the said intended security, the said C. D. hath effected an assurance on the life of the said A. B. with the —— Life Assurance Society, by a policy of assurance, bearing date the —— day of ——, in the sum of £——, and at or under the annual premium of £——; AND WHEREAS, as further part of the said intended security, the said C. D. hath effected an assurance on the life of the said A. B., with the —— Life Assurance Society, by a policy of assurance, bearing date the —— day of ——, numbered ——, in the sum of £——, and at or under the annual premium of £——: NOW THIS INDENTURE WITNESSETH that, in further pursuance of the said agreement, and in consideration of the sum of £—— to the said A. B., at or immediately before the sealing and delivery of these presents, paid by the said C. D., (the receipt of which said sum of £—— the said A. B. doth hereby acknowledge, and of and from the same, and every part thereof, doth acquit, release, and discharge the said C. D., his heirs, executors, administrators, and assigns for ever, by these presents): He, the said A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors and administrators, that he the said A. B., his heirs, executors, or administrators shall and will pay, or cause to be paid unto the said C. D., his executors, administrators, or assigns, the sum of £——, and the sum of £——, as and for one year's interest for the same, at the rate of £—— for £100 for a year, making together the sum of £——, in the parts, shares, and proportions following, namely, the sum of £——, being half-a-year's interest for the said sum of £—— at the rate aforesaid, on the —— day of —— next ensuing the date of these presents, which will be in the year 18—, and the sum of £——, the residue thereof, being the whole of the said principal sum of £——, and another half-year's interest for the same, at the rate aforesaid, on the —— day of —— then next following, which will be in the year 18—, without any deduction or abatement whatsoever for or in respect of any taxes, charges, rates, assessments, or impositions whatsoever: AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, He, the said A. B. doth, by these presents, grant, bargain, sell, and demise unto the said C. D., his executors, administrators, and assigns, ALL and every the manors or lordships of &c., AND ALL and every the capital and other

Witnesseth.

Receipt.

Covenant by the mortgagor for payment of principal and interest.

Witnesseth further grant and demise.

Parcels.

messuages, &c., [*parcels*], and in the first schedule hereunder written or hereunto annexed particularly mentioned; AND ALSO, all the tithes, great and small, and parcels and portions thereof, and all moduses in lieu of tithes, within the townships, villages, hamlets, and places of ——, and all other tithes whatsoever within the precincts or rectory of ——, in the said county of ——, and in the said first schedule hereto more particularly mentioned; AND ALL and singular other the tenements and hereditaments (if any) for which the said A. B. is seised or entitled for an estate for his life, under the said will of the said X. Y.; AND ALL and singular other the tenements and hereditaments (if any) mentioned or comprised in the said first schedule hereunder written or hereunto annexed, [*General words for manors, messuages and lands*]—TO HAVE AND TO HOLD the said manors or lordships, messuages, tenements, lands, tithes, moduses, and hereditaments; and all and singular other the premises hereby granted and demised, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns, for and during the term of ninety-nine years, to commence and be computed from the day next before the day of the date of these presents, and thenceforth next ensuing and fully to be complete and ended, if the said A. B. shall so long live, without impeachment of waste(*a*), SUBJECT NEVERTHELESS to the several annuities, mortgages, charges, and incumbrances now affecting the same premises respectively, and mentioned in the said second schedule to these presents; AND SUBJECT also to the proviso or agreement hereinafter contained for redemption of the same premises, (that is to say): PROVIDED ALWAYS, and it is hereby agreed and declared, between and by the said A. B. and the said C. D., and the true intent and meaning of them and of these presents is, that if the said A. B., or his assigns, shall pay or cause to be paid to the said C. D., his executors, administrators, or assigns the aforesaid sum of £——, in the parts, shares, and proportions, and on or at the days or times in the covenant

OF LIFE ESTATE AND POLICIES.

Habendum for the term of ninety-nine years, if the mortgagor so long live.

Proviso for redemption, both of the estate and policies.

(*a*) In making mortgages of life estates, it is usual to demise for a term determinable on the death of the tenant for life, instead of conveying the freehold to the mortgagee, in order to avoid the risk of suspending or extinguishing powers of leasing, or other powers which may be vested in the tenant for life. See 1 Sugd. Pow. ch. ii. sects. ii. iii. and iv., p. 50 et. seq. (6th edit.); 2 Chance on Powers, ch. xxiv. sect. ii. art. 3136 et seq., and Supplement, p. 111 et seq.

Mortgages of life estates usually made by demise.

OF LIFE ESTATE AND POLICIES.

hereinbefore contained mentioned for payment thereof, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents, then and in such case, and at any time after such payment shall have been so made as aforesaid, the said C. D., his executors, administrators, or assigns shall and will, upon the request and at the costs and charges of the said A. B. or his assigns, surrender the said hereditaments and premises hereinbefore demised, or expressed and intended so to be, unto the said A. B. or his assigns, and assign the said policies of insurance effected in the name of the said C. D. as aforesaid, unto the said A. B., his executors, administrators, and assigns, or as he or they shall direct, free from all incumbrances whatsoever, made, done, or committed by the said C. D., his executors, administrators, or assigns, or any of them, so as, for the doing thereof, the said C. D., his executors, administrators, or assigns be not compelled or obliged to go or travel from the place or places of his or their or any of their usual abode or dwelling: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said A. B. and C. D., that if, before the said policies of assurance shall have been assigned to the said A. B., his executors, administrators, and assigns, as aforesaid, any monies shall become payable under or by virtue of the same, then and in such case the said C. D., his executors, administrators, and assigns, shall stand and be possessed of and interested in the said policies of assurance, and the said monies to become payable under or by virtue of the same, UPON TRUST, that he, the said C. D., his executors, administrators, or assigns, do and shall enforce payment of, and receive the said monies to become payable under or by virtue of the same policies respectively as and when the same shall respectively become payable, AND do and shall, in the first place, by and out of the same monies, reimburse himself or themselves, or pay or discharge all the costs and expenses to be incurred in obtaining payment of, and receiving the said monies, or which shall be incurred in or about the execution of the trusts of these presents, or in relation thereto; AND do and shall, in the next place, pay and apply such monies in or towards satisfaction of all and singular the monies which, for the time being, shall be due or owing on the security of these presents, AND do and shall pay the surplus, if any, of the said monies to become payable under or by virtue of the said policies, unto the said A. B., his executors, administrators, or assigns, for his or their proper use; AND THE

Trusts of the money to become payable under the policies of assurance.

Covenant by

SAID A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors and administrators, that in case the said principal sum of £——, or any part thereof, shall not be paid at the time in the covenant hereinbefore contained mentioned for the payment thereof, he, the said A. B., his heirs, executors, or administrators, shall and will, so long as the said sum of £——, or any part thereof, shall remain unpaid, pay or cause to be paid to the said C. D., his executors, administrators, or assigns, interest for the said sum of £——, or for so much thereof as shall, for the time being, remain unpaid, after the rate of £— per cent. per annum, by equal half-yearly payments, on the —— day of ——, and the —— day of —— in every year, without any deduction or abatement, for or in respect of any taxes, rates, assessments, payments, or outgoings, or any other matter, cause, or thing whatsoever; AND THE SAID A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors, administrators, and assigns, that he the said A. B. shall not, nor will at any time hereafter do, commit, or suffer any act, deed, or thing whereby the said policies of assurance on his life or either of them, may be vitiated or become void or voidable, or the said C. D., his executors, administrators or assigns, may be prevented or hindered from receiving or recovering the money intended to be thereby respectively assured, or any part thereof respectively; AND THAT, if the said policies, or either of them, shall become voidable, he, the said A. B., shall and will, immediately thereupon, at his own costs and charges, do all such acts and things as may be necessary for restoring and keeping on foot the same: AND THAT, if the said policies, or either of them, or any new policy or policies to be effected as hereinafter is mentioned, shall be vitiated, or become void, then, and in such case, and so often as the same shall happen, he, the said A. B. shall and will, immediately thereupon, at his own costs and charges, effect or make, furnish and do, all such appearances, statements, certificates, acts and things as shall be expedient for enabling the said C. D., his executors, administrators, or assigns to effect a new policy, or new policies of assurance, on the life of the said A. B., in the name or names of the said C. D., his executors, administrators, or assigns, and for a sum or sums not less in the whole than the sum or sums which would have then become payable, under the said policy or policies which

the mortgagor for payment of interest on the principal, if it be not paid at the day fixed.

Covenants by the mortgagor not to do any act to vitiate the policies;

—and if the policies become voidable, to restore them;

—and if void, to effect new policies;

OF LIFE ESTATE AND POLICIES.

shall have been so vitiated or become void, if the said A. B. had then died; and that every such new policy, and the monies to become payable under or by virtue of the same, shall be subject to the proviso for redemption hereinbefore contained, and be held and applied upon the trusts, and for the purposes in and by these presents declared and expressed concerning the said policies of assurance hereinbefore mentioned to have been effected, and the monies to become payable under or by virtue of the same: AND FURTHER, THAT he, the said A. B., shall and will, during the continuance of the present security, from time to time, duly pay, or cause to be paid, the said annual premiums of £—— and £——, and such other annual premium or premiums, sum or sums of money (if any) as shall from time to time become payable, for keeping on foot the said policies of assurance hereinbefore mentioned to have been effected respectively, and any new policy or policies of assurance to be effected as hereinbefore is provided, and shall and will make such payments on the first day on which the same respectively must be paid, in order to keep the same policies respectively on foot, and shall and will forthwith deliver the receipt for every such payment to the said C. D., his executors, administrators, or assigns: AND THAT, if the said A. B. shall neglect or refuse to make such payments as aforesaid, or any of them, at the times aforesaid, then, and in such case, and so often as the same shall happen, it shall be lawful for the said C. D., his executors, administrators, or assigns, to pay the said annual premiums of £——, and £——, and such other annual premium or premiums, sum or sums of money (if any) as shall from time to time become payable for keeping on foot the said policies of assurance, or any of them: AND FURTHER, THAT he, the said A. B., his executors, administrators, or assigns, shall and will, from time to time, on demand, pay, or cause to be paid unto the said C. D., his executors, administrators, or assigns, all and every such sum and sums of money as shall have been paid by him or them in or towards payment of the said annual premiums of £—— and £——, or either of them, or any such annual premium or premium, sum or sums of money as aforesaid, and all costs, charges, and expenses (if any) which shall have been paid by the said C. D., his executors, administrators, or assigns, in effecting such new policy or policies of assurance as aforesaid, or otherwise, in relation to the premises, with interest for the same, after the rate of £—— per cent. per

—and to pay the premiums on the policies;

—and that, on his refusal or neglect, the mortgagees may pay them;

—and that the mortgagor will repay all monies advanced by the mortgagees, with interest.

annum, from the time or respective times of the same having been advanced or paid: AND THAT, in the meantime, and until the same shall be so paid, with interest as aforesaid, all and singular the said hereditaments and premises hereinbefore demised, or expressed and intended so to be, and the monies to become payable under or by virtue of the said policies hereinbefore mentioned to have been effected, or under or by virtue of any new policy or policies to be effected in pursuance of the aforesaid provision in that behalf, shall stand and be charged with the payment as well of such sum or sums of money, and the interest thereon, as of the said sum of £——, and interest: AND THE SAID A. B. doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said C. D., his executors, administrators, and assigns, in manner following, (that is to say), that he, the said A. B. now hath in himself good right, full power, and lawful and absolute authority, to grant and demise the said hereditaments and premises hereinbefore granted and demised, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns, subject as hereinbefore is mentioned, and in manner aforesaid, according to the true intent and meaning of these presents: AND, MOREOVER, THAT he, the said A. B., his executors and administrators, and all and every other person or persons whosoever, having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, or interest of, in, or to the said hereditaments and premises hereinbefore granted and demised, or expressed and intended so to be, or any of them, or any part or parts thereof, or of, in, or to the said policies of assurance hereinbefore mentioned to have been effected, or any other policy or policies to be effected as aforesaid, shall and will, from time to time, and at all times hereafter, upon the request of the said C. D., his executors, administrators, or assigns, but at the costs and charges of the said A. B., his executors or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful acts, deeds, matters, things, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting and demising the said hereditaments and premises hereinbefore granted and demised, or expressed and intended so to be, unto the said C. D., his executors, administrators, and assigns, and for enabling him and them to recover and receive the monies to be-

OF LIFE ESTATE AND POLICIES.

—and that, till repayment, the same shall be a charge on the mortgaged premises.

Covenants by mortgagor

—for right to demise.

—and for further assurance.

OF LIFE ESTATE AND POLICIES.

come payable under or by virtue of the said policies of assurance, or any of them, in manner and for the purposes aforesaid, according to the true intent and meaning of these presents as by the said C. D., his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably devised, or advised and required: PROVIDED ALWAYS, and it is hereby agreed and declared, between and by the said C. D., and A. B., and the true intent and meaning of them and of these presents nevertheless further is, that it shall be lawful for the said A. B., and his assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy, all the said hereditaments and premises hereinbefore granted and demised, or expressed and intended so to be, and to receive and take the rents, issues, and profits thereof, to and for his and their own use, until default shall be made in payment of the said sum of £——, or some part thereof, contrary to the aforesaid covenant and proviso for payment of the same, and the true intent and meaning of these presents, without any let, suit, trouble, interruption, or disturbance whatsoever, of, from, or by the said C. D., his executors, administrators, or assigns, or any other person or persons whomsoever, lawfully or equitably claiming, or to claim, by, from, or under him, them, or any of them (*b*): AND IT IS HEREBY further agreed and declared, that the said C. D., his executors, administrators, or assigns, or any of them, shall not be answerable

Proviso for quiet enjoyment until default.

Mortgagee not to be accountable for involuntary losses.

Power of sale usual in mortgages of life estates and policies of assurance.

(*b*) If the policy be effected otherwise than in the name of the mortgagee, a proviso that his receipt shall be a discharge to the office for the money payable under the policy must be inserted. See the form, infra, Vol. III. p. 616. It is usual, in mortgages of property of this description, to insert a power of sale, especially if there is any risk that the income of the property may be inadequate to pay the premiums of the policy. The power of sale in Vol. III. p. 606 et seq., will suit this case with very slight alteration; the power should particularly provide for the sale of the property demised, and the policies separately or together. It sometimes happens that a mortgagee or trustee has a policy, and no fund for payment of the premiums, and no power of sale; in that case, the best course for him (if it be possible) will be to surrender the policy to the office by which it was granted. A mortgagee might undoubtedly, if he pleased, allow the policy to drop; and it is apprehended that a trustee would be at liberty to do the same; but the more expedient course seems to be, to surrender the policy, if a title can be made to it sufficient to satisfy the office. It should be remembered, however, that a mortgagee advancing the premiums out of his own funds would, even in the absence of a special agreement, have a lien on the policy for the amount of the premiums, with interest at £4 per cent. *Hodgson* v. *Hodgson*, 2 Keen, 704;

Power of a mortgagee or trustee to surrender a policy on failure of the fund for payment of premiums.

or accountable for any involuntary losses which may happen in or about the execution of any of the trusts of these presents, or in relation thereto: PROVIDED ALWAYS, and it is hereby agreed and declared, between and by the parties to these presents, that the total amount of the money hereby secured, or to be ultimately recoverable hereupon, shall not exceed the sum of £——. IN WITNESS &c.

Limit of the amount to be secured.

FIRST SCHEDULE referred to in the above-written indenture.

SECOND SCHEDULE referred to in the above-written indenture.

Burridge v. *Row*, 1 You. & Coll. N. C. 183, infra, Vol. III. p. 615, n. (*c*); and it is apprehended that a trustee would have the same lien. Of course, if a policy is intended to be surrendered, notice of the intention should be given to the mortgagor or the cestuis que trust, or such of them as are in esse and sui juris.

V.

OF A SHIP.

MORTGAGE *of a* SHIP *and* CARGO *and of a* POLICY *of* INSURANCE *on the same.* — SHORT FORM *of* COVENANT *for* PAYMENT *of the* MORTGAGE MONEY.

THIS INDENTURE, made &c., BETWEEN A. B., of &c. [*mortgagor*], of the one part, and C. D., E. F., G. H., and I. K., of &c., merchants, carrying on business under the firm of —— & Co. [*mortgagees*], of the other part: WHEREAS, the said A. B. is the sole owner or proprietor (subject to the mortgages hereinafter mentioned) of a certain ship or vessel, called the ——, of ——, of the burthen of —— tons, now on the South Sea whale fishery, whereof X. Y. is now master: AND WHEREAS the said ship or vessel has been duly registered pursuant to act of Parliament, and the certificate of the registry thereof is in the words and figures, or to the effect

Parties.

Recital that the mortgagor is sole owner of the ship.

—of the certificate of registry.

OF A SHIP.

following; (that is say) [*Certificate of registry verbatim*], (*a*) and the indorsements on the said certificate are in the words and figures or to the effect following (*b*), [*Indorsements on certificate verbatim*]: AND WHEREAS, &c. [*Recitals of the prior mortgages*].

—that the mortgagor is indebted to the mortgagees,

AND WHEREAS the said A. B. is indebted to the said C. D., E. F., G. H., and I. K., in the sum of £——, and it has been agreed that the repayment of the same, with interest, as hereinafter mentioned, shall be secured in manner hereinafter appearing.

and of the agreement for the mortgage.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the said sum of £—— so owing, as aforesaid,

Witnesseth.

—covenant for repayment of the mortgage-money, with interest.

he the said A. B. doth hereby for himself, his heirs, executors, and administrators, covenant with the said C. D., E. F., G. H., and I. K., their executors and administrators, that he the said A. B., his heirs, executors, or administrators, shall and will pay, or cause to be paid, unto the said C. D., E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, the sum of £——, together with interest for the same, after the rate of £—— per cent. per annum, from the day of the date of these presents, upon the —— day of —— now next ensuing, without any deduction or abatement whatsoever for or in respect of any taxes, rates, assessments, payments, or outgoings, or any other matter, cause, or thing whatsoever (*c*): AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement, and for the consideration aforesaid, he the said A. B. doth by these presents grant, assign, and transfer unto the said C. D., E. F., G. H., and I. K., their executors, administrators, and assigns, ALL THAT the said ship or vessel called the ——, now on the South Sea whale fishery, together with all and singular masts, bowsprits, yards, gaffs, sails, sailyard, anchors, chain and other

Witnesseth further.

—assignment of the ship and appurtenances.

Recital of certificate of registry.

(*a*) The practice of reciting the certificate of registry verbatim arose under the old statutes, which required a recital of the certificate of registry without the qualifying words in the present statute, "or the principal contents thereof;" see 3 & 4 Will. 4, c. 55, sect. 31, in the note at the end of this chapter. The practice is still to recite the certificate verbatim.

Indorsements need not be recited.

(*b*) It is not necessary to recite the indorsements, *Campadose* v. *Codner*, 1 Bos. & Pull. 483; but they generally are recited.

Mortgage of a ship void under the Registry Act is good for collateral purposes.

(*c*) An action may be brought on the covenant to pay the money, notwithstanding the deed may be void as a mortgage of the ship, by reason of the provisions of the Registry Act not having been complied with. *Kerrison* v. *Cole*, 8 East, 231.

OF A SHIP.

cables, hawsers, windlasses, capstans, standing and running rigging, ropes, cords, cannons, carronades, swivel and other guns, fire-arms, and gunpowder, shot, artillery, and ammunition, chain and other pumps, provisions, stores, tackle, netting, boats, oars, boat-hooks, water and oil casks, harpoons, fishing and other tackle, furniture, materials, steering wheel, binnacle and compass, appendages and appurtenances whatsoever to the said ship or vessel belonging or in anywise appertaining; AND ALSO all the blubber, oil, and head matter, and other cargo now caught or procured, or which may hereafter be caught, procured, or brought home, upon, out of, or in the said ship on her present or any future voyage or expedition (*d*); AND ALSO, all that the policy of insurance,

—and the cargo.

—and the

(*d*) The freight to be earned on a future voyage cannot, it seems, be assigned at law; *Robinson* v. *Macdonnell*, 5 Mau. & Sel. 228; but may be assigned in equity. *Douglas* v. *Russell*, 4 Sim. 524; S. C. 1 My. & Ke. 488; and see, too, Lord Eldon's observation, *Re Ship Warre*, 8 Price, 269. And the freight to be earned on a voyage immediately in contemplation may be assigned even at law. *Leslie* v. *Guthrie*, 1 Bing. N. C. 697. Not that the future freight of a ship can be assigned, either at law or in equity, generally and absolutely, so as to separate the ship and her earnings for ever, but that all future earnings may be assigned for a specified purpose—such, for example, as the payment of a debt. *Speldt* v. *Lechmere*, 13 Ves. 588; *Re Ship Warre*, 8 Price, 269, note, and the cases above cited. In the case of a whaling voyage, it has been expressly decided that future cargo may be assigned in equity. *Langton* v. *Horton*, 1 Hare, 549.

Assignment of freight.

An assignment of a ship and freight, which is void as to the ship by reason of a failure to comply with the requisitions of the Registry Act, is good as to the freight. *Mestaer* v. *Gillespie*, 11 Ves. 621, 638; *Davenport* v. *Whitmore*, 2 My. & Cra. 177.

—not void by reason of non-compliance with the Registry Act.

A mortgagee who takes possession of the ship during the voyage will be entitled to sue in his own name for any freight belonging to the mortgagor, though not included in the mortgage; *Dean* v. *M'Ghee*, 4 Bing. 47; S. C. 12 Moore, 185; *Kerswill* v. *Bishop*, 2 Cro. & Jer. 529; S. C. 2 Tyrwh. 602; but a mortgagee who does not take possession is not entitled to the freight in his own name; *Chinnery* v. *Blackburne*, 1 H. Blackst. 117, note; S. C. nom. *Chinnery* v. *Blackman*, 3 Doug. 391; although it seems the freight passes as an incident to the ship, and he may sue for it in the name of the mortgagor. *Morrison* v. *Parsons*, 2 Taunt. 407; *Case* v. *Davidson*, 2 Brod. & Bing. 379; S. C. 5 Mau. & Sel. 79.

Freight passes by an assignment of the ship.

In the precedent in the text, the assignment is of the cargo, because the ship was on a whaling voyage on account of her owner. If she had been, or were going, on an ordinary voyage, the assignment would be of "all freight and earnings now earned, or which may hereafter be earned by the said ship or vessel," &c.

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dated the —— day of ——, and effected by the said A. B., with ——, on the said ship and cargo, and all and singular other the policies of insurance (if any) upon the said ship and cargo, or either of them, or the interest of the said A. B., therein respectively, and all and every the sums and sum of money, to be had, recovered, or obtained, under or by virtue of any such policy or policies of insurance, or so much and such part thereof as the said A. B. would, but for this indenture, have become entitled to (*e*);

policy of insurance.

AND ALL THE ESTATE, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him, the said A. B., of, in, to, or out of the said premises, or any of them, or any part thereof; TOGETHER WITH full power and authority for the said C. D., E. F., G. H., and I. K., and the survivors and survivor of them, and the executors or administrators of such survivor, their or his assigns, to ask, demand, sue for, recover, and receive, and give effectual receipts and discharges for the said ship, cargo, sums and sum of money, and premises, or any of them, or any part thereof respectively, in the name or names of the said A. B., his executors or administrators; TO HAVE, HOLD, receive, and take the said ship or vessel, cargo, policy or policies of insurance, and all and singular other the premises hereby assigned, or expressed and intended so to be, unto the said C. D., E. F., G. H., and I. K., their executors, administrators, and assigns, subject to the contract or articles entered into with the master, officers, and crew of the said ship or vessel, and also subject to the said three several mortgages of the —— day of ——, the —— day of ——, and the —— day of ——, respectively, and subject also to the proviso for redemption hereinafter contained, (that is to say): PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said C. D., E. F., G. H., and I. K., and the said A. B., and the true intent and meaning of them and of these presents nevertheless is, that if the said A. B., his executors, administrators, or assigns, shall pay, or cause to be paid, unto the said C. D., E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, the aforesaid sum of £——, with interest for the same as aforesaid, according to

And all the estate, &c.

Power of attorney.

Habendum to the mortgagees, subject to the articles, and to certain prior mortgages, and to the proviso for redemption.

Proviso for redemption.

(*e*) As the mortgagee is not legal owner, he cannot, on his own account, recover on an insurance effected by himself any sum beyond the amount of his debt. *Irving* v. *Richardson*, 2 B. & Ad. 193.

Mortgagee's interest in a policy of insurance on a ship.

the covenant hereinbefore contained for payment thereof, without any deduction or abatement whatsoever, as aforesaid, according to the true intent and meaning of these presents, then and in such case, they, the said C. D., E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, shall and will at any time or times after such payment shall have been so made as aforesaid, upon the request, and at the costs and charges of the said A. B., his executors, administrators, or assigns, re-assign all and singular the said premises hereinbefore assigned, or expressed and intended so to be, unto the said A. B., his executors, administrators, and assigns, or as he or they shall, in that behalf, direct, subject as hereinbefore is mentioned, but free from all incumbrances whatsoever, made, done, or committed by the said C. D., E. F., G. H., and I. K., or any of them, their, or any of their executors, administrators, or assigns, so as for the doing thereof the said C. D., E. F., G. H., and I. K., or any of them, their or any of their executors, administrators, or assigns, be not compelled or obliged to go or travel from the place or places of their or any of their usual abode or dwelling: AND HE, THE SAID A. B., doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., E. F., G. H., and I. K., their executors and administrators, that in case the said entire principal sum of £—— shall not be paid on the said —— day of ——, he the said A. B., his heirs, executors, or administrators, shall and will, so long as the said sum of £——, or any part thereof, shall remain unpaid, pay or cause to be paid unto the said C. D., E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, interest for the said sum of £——, or for so much thereof as shall, for the time being, remain unpaid, after the rate of £—— per cent. per annum, without any deduction or abatement whatsoever, as aforesaid: [*Proviso as to joint account, supra, p.* 513]. AND THE SAID A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., E. F., G. H., and I. K., their executors, administrators, and assigns, by these presents, in manner following, (that is to say), THAT he, the said A. B., is the sole and absolute owner (subject to the three mortgages aforesaid) of the said ship called the ——, and that he, the said A. B., now hath in himself the good right, full power, and lawful and ab-

Covenant by mortgagor to pay interest on mortgage-money, if not paid at the appointed day.

Covenants by the mortgagor.

—for right to assign.

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solute authority to assign the said ship or vessel, cargo, policy or policies of insurance, and premises hereinbefore assigned, or expressed and intended so to be, unto the said C. D., E. F., G. H., and I. K., their executors, administrators, and assigns, in manner and subject as aforesaid, according to the true intent and meaning of these presents; AND THAT it shall be lawful for the said C. D., E. F., G. H., and I. K., their executors, administrators, and assigns, from time to time, and at all times after default shall have been made in payment of the said principal sum of £—— and the interest thereon, or of any part thereof respectively, at the time hereinbefore appointed for the payment thereof (but subject and without prejudice to the three several mortgages aforesaid), to enter into and upon, and take possession of, and peaceably and quietly have, hold, possess, and enjoy the said ship or vessel, cargo, policy or policies of insurance, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, to and for their own use and benefit, without any manner of hindrance, interruption, molestation, claim, or demand whatsoever, of, from, or by the said A. B., his executors, administrators, or assigns, or any other person or persons whomsoever, (save and except the persons claiming under or by virtue of the three several mortgages aforesaid, or any of them); AND THAT free and clear, and freely and clearly, and absolutely released and discharged, or otherwise, by the said A. B., his executors or administrators, saved, defended, kept harmless, and indemnified, from and against all and all manner of former and other estates, titles, charges, and incumbrances whatsoever, except the said three mortgages; AND, MOREOVER, that he, the said A. B., his executors or administrators, and all and every persons and person whosoever claiming, or to claim, any right, title, or interest in or to the said ship, or vessel, and premises hereinbefore assigned, or expressed and intended so to be, shall and will, from time to time and at all times hereafter, upon every request of the said C. D., E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, but at the costs and charges of the said A. B., his executors or administrators, make, do, and execute, or cause and procure to be made, done, and executed, all such further acts, deeds, and assurances whatsoever, for the more effectually assigning and assuring the said ship or vessel, cargo, policy or policies of insurance, and premises hereinbefore assigned, or expressed and

—for quiet enjoyment after default.

—free from incumbrances.

—and for further assurance.

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intended so to be, unto the said C. D., E. F., G. H., and I. K., their executors, administrators, and assigns, in manner and subject as aforesaid, and according to the true intent and meaning of these presents, and enabling them to obtain possession of the same, and to recover and obtain payment of all monies (if any) to become payable under or by virtue of the said policy or policies of insurance, or any of them, as by the said C. D., E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, or their or his counsel in the law, shall be reasonably devised, or advised and required: PROVIDED ALWAYS, and it is hereby declared and agreed, that until default shall be made by the said A. B., his executors or administrators, in payment of the said principal sum of £—— and interest, or some part thereof respectively, at the time hereinbefore appointed for payment thereof, it shall be lawful for the said A. B., his executors, administrators, and assigns, peaceably and quietly to have, hold, possess, and enjoy the said ship, or vessel, cargo, policy or policies of insurance, and all and singular other the premises hereinbefore assigned, or expressed and intended so to be, for his and their own use and benefit, without any interruption by the said C. D., E. F., G. H., and I. K., or any of them, their or any of their executors, administrators, or assigns, or any person or persons claiming, or to claim, by, from, through, or under them, or any of them, any thing hereinbefore contained to the contrary notwithstanding: AND THE SAID A. B., doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., E. F., G. H., and I. K., their executors, administrators, and assigns, that he, the said A. B., his executors, administrators, or assigns, shall and will, at all times during the continuance of this security, keep the said ship and cargo insured to the amount of £——, at the least, and pay or cause to be paid all such premiums and duty, and other sum or sums of money (if any) as shall become payable in order to keep the said ship and cargo so insured; AND THAT, in default thereof, it shall be lawful for the said C. D., E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, to insure and keep the said ship and cargo insured to the amount aforesaid, and to pay any premium or premiums and duty, or other sum or sums of money necessary for keeping the said ship or cargo so insured; AND THAT he, the said A. B., his

Proviso for quiet enjoyment by mortgagor till default.

Covenant by mortgagor to keep the ship and cargo insured.

—and that, in default, the mortgagees may insure.

—and that the

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executors, administrators, and assigns, shall and will, from time to time, on demand, pay or cause to be paid unto the said C. D., E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, such sum or sums of money as they or he shall pay or advance for any of the purposes aforesaid, with interest for the same after the rate aforesaid, from the time or respective times of the same being so advanced or paid; AND THAT, in the meantime, and until the same shall be so repaid, all and singular the premises hereinbefore assigned, or expressed and intended so to be, shall be, and remain charged with, and not be redeemable until full payment of the same respectively, as well as of the said sum of £——, and the interest thereon; AND FURTHER, that he, the said A. B., his executors, administrators, or assigns, shall and will, from time to time, by writing, apprise the said C. D., E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, of all and every or any information or intelligence which the said A. B., his executors, administrators, or assigns, shall or may, at any time during the continuance of the security intended to be hereby made, in any manner receive, obtain, or acquire of and concerning the said ship or vessel and cargo hereinbefore assigned, or expressed and intended so to be, when and as often as, and immediately upon such information or intelligence being received, obtained or acquired by him or them, as aforesaid: AND IT IS HEREBY agreed and declared between and by the said parties to these presents, that if default shall be made in payment of the said sum of £——, or of the interest thereon, or of any part thereof respectively, on the said —— day of ——, then and in such case it shall be lawful for the said C. D., E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, at any time or times thereafter, without any further consent on the part of the said A. B., his executors, administrators, or assigns, to make sale and dispose of the said ship or vessel, cargo, policy or policies of insurance, and premises hereinbefore assigned, or expressed and intended so to be, or any of them, or any part or parts thereof respectively, either together or separately, or in shares or lots, and either subject to, or (with the concurrence of the person or persons for the time being entitled thereto respectively) freed and dis-

mortgagor will repay the advances made for such purpose.

—and that, till repayment, the same shall be a charge on the mortgaged premises.

—and that the mortgagor will give the mortgagees any intelligence he may receive of the ship.

Power of sale.

charged from, the three several mortgages aforesaid, or any of them, and either by public auction or private contract, with full power, upon any such sale or sales, to make any stipulations which they or he shall deem necessary; and also, with full power to buy in the same premises or any part or parts thereof, at any sale or sales by public auction, and to rescind any contract or contracts for the sale of the same premises or any part thereof, and to resell the premises which shall have been so bought in, or as to which any contract or contracts for sale shall have been rescinded as aforesaid, without being responsible for any loss which may be occasioned thereby; and that, for the purposes aforesaid, or any of them, it shall be lawful for the said C. D., E. F., G. H., and I. K., and the survivors and survivor of them, and the executors or administrators of such survivor, their or his assigns, to make, do, and execute, or cause to be made, done, and executed, all such agreements, deeds, assignments, and assurances, acts, matters, and things, as they or he shall think fit: PROVIDED ALSO, and it is hereby agreed and declared, that upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers shall not be bound to see or inquire whether any default was made as aforesaid, or whether any money remains due or owing on the security of these presents, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety or regularity of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, so far as regards the safety and protection of the purchaser or purchasers, be deemed and taken to be within the aforesaid power in that behalf, and be valid and effectual accordingly, and the remedy of the said A. B., his executors, administrators, or assigns, in respect of any impropriety or irregularity, shall be in damages only: AND IT IS HEREBY also agreed and declared that the receipt or receipts in writing of the said C. D., E. F., G. H., and I. K., or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns, for the purchase-money of the premises to be sold, and for any monies which, upon any such sale as aforesaid, may become payable under the aforesaid policy or policies of insurance, or any of them, shall be an effectual discharge or effectual discharges to the purchaser or purchasers for the money therein respectively expressed to be received, and that

Purchasers not to be bound to see that certain events have happened.

Mortgagees' receipts for the purchase-money and insurance to be effectual.

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such purchaser or purchasers, insurer or insurers, after payment of his or their purchase or insurance money, shall not be concerned to see to the application of such money, or be answerable for any loss or misapplication thereof; AND THAT it shall be lawful for the said C. D., E. F., G. H., and I. K., and the survivors and survivor of them, and the executors and administrators of such survivor, their and his assigns, to settle and adjust, or compromise, or join in settling and adjusting or compromising, any loss or damage which may be sustained by the said ship or vessel, or cargo, and the sum or sums to become payable in consequence thereof under such policy or policies of insurance, or any of them, and otherwise to act in relation thereto as if they or he were the absolute owners or owner of the said ship and cargo, and the same shall be binding and conclusive on the said A. B., his executors, administrators, and assigns: AND IT IS HEREBY further agreed and declared that the said C. D., E. F., G. H., and I. K., and the survivors and survivor of them, and the executors and administrators of such survivor, their and his assigns, shall hold all and singular the monies which shall arise from any sale which shall be made in pursuance of the aforesaid power in that behalf, and all and singular the monies which shall be received under and by virtue of the said policy or policies of insurance, or any other policy or policies of insurance to be effected as hereinbefore is provided, (after payment thereout of all such sums as shall be payable thereout, to the master, officers, or crew of the said ship or vessel), UPON THE TRUSTS following, (that is to say), UPON TRUST, in the first place, by or out of the same monies, to reimburse themselves or himself, or pay or discharge all costs and expenses attending such sale or sales, or otherwise to be incurred in or about the exercise of the said power of sale, or in anywise relating thereto, or which shall or may be sustained or incurred in or about the compelling or enforcing payment of the several sums, under or by virtue of the said policy or policies of insurance or otherwise in respect of the same premises; AND, in the next place, upon trust, to apply such monies, or so much thereof as shall remain after the discharge of the three several mortgages aforesaid, or such of them as the sale shall not be made subject to, in or towards satisfaction of all and singular the monies which, for the time being, shall be due or owing on the security of these presents, AND then, upon trust, to pay the surplus (if any) of the said

—that mortgagees may settle or compromise any loss sustained by the ship.

Trusts of purchase-money.

monies, which shall arise from any such sale as aforesaid, unto the said A. B., his executors, administrators, or assigns, for his and their own use and benefit: AND IT IS HEREBY agreed and declared that the aforesaid power of sale shall and may be exercised by any person or persons who, for the time being, shall be entitled to receive, and give a discharge for the monies which, for the time being, shall be due or owing on the security of these presents: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said C. D., E. F., G. H., and I. K., or any of them, their or any of their executors, administrators, or assigns, shall not be answerable or accountable for any involuntary losses which may happen in or about the exercise or execution of the aforesaid power and trusts, or any of them; PROVIDED ALSO, and it is hereby agreed and declared, that the aforesaid power of sale or anything herein contained shall not in anywise prejudice or affect the right of the said C. D., E. F., G. H., and I. K., or of the survivors or survivor of them, or of the executors or administrators of such survivor, their or his assigns, to foreclose the equity of redemption of the premises aforesaid, or of the unsold part thereof, for the time being: PROVIDED ALWAYS, and it is hereby agreed and declared, that the total amount of money hereby secured, or to be ultimately recoverable hereupon, shall not exceed the sum of £—— (*f*). IN WITNESS &c. (*g*).

Power may be exercised by any one entitled to the purchase-money.

Mortgagees not to be liable for involuntary losses.

Power of sale not to prejudice the right of foreclosure.

Limit of amount to be secured.

(*f*) Any disposition of a ship, "or any part, interest, share, or property" therein, is, by the acts 6 Geo. 4, c. 41, and 3 & 4 Will. 4, c. 55, s. 32, exempted from stamp duty. The addition of collateral matter will, however, it is apprehended, subject the instrument to stamp duty. Thus, the covenants for payment of the money will render the deed liable to a deed stamp; and the mortgage of the freight and policy of insurance will require the ordinary mortgage stamps. It is, however, possible, that the freight and policy may be deemed to be interests in the ship, and to be, therefore, included in the exemptions. See the cases as to freight, supra, p. 545.

Stamp duty on the mortgage of a ship—freight—and policy of insurance.

(*g*) A mortgage of a ship must be taken to the collector and comptroller of the custom-house of the port where the ship is registered, immediately after its execution, to be registered, and a memorandum of the registry should be indorsed by them upon the deed. A memorandum of the deed must be similarly indorsed upon the certificate of registry, as soon as the vessel returns to port, and notice given to the commissioners of customs.

Mortgage of a ship to be registered.

The memorandum of registry must, in each case, contain the names, residences, and descriptions of the mortgagor and mortgagees, the number of shares transferred, the date of the deed, and of its production, and the char-

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acter of the deed as a mortgage; see statute 3 & 4 Will. 4, sects. 24 and 42, infra.

Notice of mortgage of cargo or freight to be given to those from whom they are to be received.

Notice of the assignment of the cargo or freight and earnings must be given to the person from whom they are to be received. *Gardner* v. *Lachlan*, 6 Sim. 407; 8 Sim. 126; S. C. 4 My. & Cra. 123; *Langton* v. *Horton*, 1 Hare, 549, a case similar to that in the text, of a ship on a whaling voyage, and in which notice was given to the master. See further as to notice, supra, Vol. III. pp. 374—376.

General law as to mortgages of ships and freight.

The law generally with respect to mortgages of ships and freight will be found in Coote on Mortgages, ch. xvi. p. 327, (2nd edit.); but as the statute there referred to (6 Geo. 4, c. 110) has since been repealed, and the words of the present statute (3 & 4 Will. 4, c. 55) are not precisely the same, the sections of the latter relating to this subject are subjoined.

Transfers of interest to be made by bill of sale.

XXXI. And be it further enacted, that when and so often as the property in any ship or vessel, or any part thereof, belonging to any of his Majesty's subjects shall, after registry thereof, be sold to any other or others of his Majesty's subjects, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity: Provided always, that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship or vessel intended in the recital be effectually proved thereby.

Bill of sale not void by unimportant error of recital, &c.

Property in ships to be divided into sixty-four parts or shares.

XXXII. And be it further enacted, that the property in every ship or vessel of which there are more than one owner, shall be taken and considered to be divided into sixty-four equal parts or shares, and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts or shares, and that no person shall be entitled to be registered as an owner of any ship or vessel, in respect of any proportion of such ship or vessel which shall not be an integral sixty-fourth part or share of the same, and upon the first registry of any ship or vessel the owner or owners who shall take and subscribe the declaration required by this act before registry be made, shall also declare the number of such parts or shares then held by each owner, and the same shall be so registered accordingly: Provided always, that if it shall at any time happen that the property of any owner or owners in any ship or vessel cannot be reduced by division into any number of integral sixty-fourth parts or shares, it shall and may be lawful for the owner or owners of such fractional parts as shall be over and above such number of integral sixty-fourth parts or shares into which such property in any ship or vessel can be reduced by division, to transfer the same one to another, or jointly to any new owner, by memorandum upon their respective bills of sale, or by fresh bill of sale, without such transfer being liable to any stamp duty; Provided also, that the right of any owner or owners to any such fractional parts shall not be affected by reason of the same not having been registered; Provided also, that it shall be lawful for any number of such owners named and described in such registry, being partners in any house or co-partnership, actually carrying on trade in any part of his Majesty's dominions, to hold any

Declaration upon first registry.

Smaller portions may be conveyed without stamp.

Partners may hold ships or shares without distinguishing

ship or vessel, or any share or shares of any ship or vessel, in the name of such house or co-partnership, as joint owners thereof, without distinguishing the proportionate interest of each such owners, and that such ship or vessel, or the share or shares thereof so held in co-partnership, shall be deemed and taken to be partnership property to all intents and purposes, and shall be governed by the same rules, both in law and equity, as relate to and govern all other partnership property in any other goods, chattels, and effects whatsoever.

proportionate interest of each owner.

XXXIII. And be it further enacted, that no greater number than thirty-two persons shall be entitled to be legal owners at one and the same time of any ship or vessel as tenants in common, or to be registered as such: Provided always, that nothing herein contained shall affect the equitable title of minors, heirs, legatees, creditors, or others exceeding that number, duly represented by or holding from any of the persons within the said number registered as legal owners of any share or shares of such ship or vessel; Provided also, that if it shall be proved, to the satisfaction of the commissioners of his Majesty's customs, that any number of persons have associated themselves as a joint-stock company for the purpose of owning any ship or vessel, or any number of ships or vessels as the joint property of such company, and that such company have duly elected or appointed any number, not less than three, of the members of the same to be trustees of the property in such ship or vessel, or ships or vessels so owned by such company, it shall be lawful for such trustees, or any three of them, with the permission of such commissioners, to make and subscribe the declaration required by this act before registry be made, except that, instead of stating therein the names and descriptions of the other owners, they shall state the name and description of the company to which such ship or vessel, or ships or vessels, shall in such manner belong.

Only thirty-two persons to be owners at one time.

Not to affect the equitable title of heirs, &c.

Joint-stock companies.

Trustees may apply to have registry made.

XXXIV. And be it further enacted, that no bill of sale, or other instrument in writing, shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, or for any other purpose, until such bill of sale, or other instrument in writing shall have been produced to the collector and controller of the port at which such ship or vessel is already registered, or to the collector and controller of any other port at which she is about to be registered *de novo*, as the case may be; nor until such collector and controller respectively shall have entered in the book of such last registry in the one case, or in the book of such registry *de novo*, after all the requisites of law for such registry *de novo* shall have been duly complied with, in the other case, (and which they are respectively hereby required to do upon the production of the bill of sale, or other instrument for that purpose), the name, residence, and description of the vendor or mortgagor, or of each vendor or mortgagor, if more than one, the number of shares transferred, the name, residence, and description of the purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale or other instrument, and of the production of it. And further, if such ship or vessel is not about to be registered *de novo*, the collector and controller of the port where such ship is registered shall, and they are hereby required to indorse the aforesaid particulars of such bill of sale or other instrument on the certificate of registry of the said ship or ves-

Bills of sale not effectual until produced to officers of customs, and entered in the book of registry or of intended registry.

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sel, when the same shall be produced to them for that purpose, in manner and to the effect following, *videlicet*.—

Form of indorsement.

"Custom house [*port and date, name, residence, and description of vendor or mortgagor*] has transferred by [*bill of sale or other instrument*] dated [*date, number of shares*] to [*name, residence, and description of purchaser or mortgagor*].

"A. B. Collector.
"C. D. Controller."

Notice to commissioners.

and forthwith to give notice thereof to the commissioners of customs, and in case the collector and controller shall be desired so to do, and the bill of sale or other instrument shall be produced to them for that purpose, then the said collector and controller are hereby required to certify, by indorsement upon the bill of sale or other instrument, that the particulars before mentioned have been so entered in the book of registry, and indorsed upon the certificate of registry as aforesaid.

Entry of bill of sale to be valid, except in certain cases.

XXXV. And be it further enacted, that when and so soon as the particulars of any bill of sale or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the said bill of sale or other instrument shall be valid and effectual to pass the property thereby intended to be transferred as against all and every person and persons whatsoever, and to all intents and purposes except as against such subsequent purchasers and mortgagees, who shall first procure the indorsement to be made upon the certificate of registry of such ship or vessel in manner hereinafter mentioned.

When a bill of sale has been entered for any shares, thirty days shall be allowed for indorsing the certificate of registry before any other bill of sale for the same shall be entered.

XXXVI. And be it further enacted, that when and after the particulars of any bill of sale, or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the collector and controller shall not enter in the book of registry the particulars of any other bill of sale or instrument purporting to be a transfer by the same vendor or mortgagor, or vendors or mortgagors, of the same ship or vessel, share or shares thereof, to any other person or persons, unless thirty days shall elapse from the day on which the particulars of the former bill of sale or other instrument were entered in the book of registry, or in case the ship or vessel was absent from the port to which she belonged at the time when the particulars of such former bill of sale or other instrument were entered in the book of registry, then, unless thirty days shall have elapsed from the day on which the ship or vessel arrived at the port to which the same belonged, and in case the particulars of two or more such bills of sale or other instruments as aforesaid shall at any time have been entered in the book of registry of the said ship or vessel, the collector and controller shall not enter in the book of registry the particulars of any other bill of sale or other instrument as aforesaid, unless thirty days shall in like manner have elapsed from the day on which the particulars of the last of such bill of sale or other instrument were entered in the books of registry, or from the day on which the ship or vessel arrived at the port to which she belonged, in case of her absence as aforesaid; and in every case where there shall at any time happen to be two or more transfers by the same owner or owners of the same

property in any ship or vessel entered in the book of registry as aforesaid, the collector and controller are hereby required to indorse upon the certificate of registry of such ship or vessel the particulars of that bill of sale or other instrument under which the person or persons claims or claim property, who shall produce the certificate of registry for that purpose within thirty days next after the entry of his said bill of sale or other instrument in the book of registry as aforesaid, or within thirty days next after the return of the said ship or vessel to the port to which she belongs, in case of her absence at the time of such entry as aforesaid; and in case no person or persons shall produce the certificate of registry within either of the said spaces of thirty days, then it shall be lawful for the collector and controller, and they are hereby required to indorse upon the certificate of registry the particulars of the bill of sale or other instrument to such person or persons as shall first produce the certificate of registry for that purpose, it being the true intent and meaning of this act that the several purchasers and mortgagees of such ship or vessel, share or shares thereof, when more than one appear to claim the same property, or to claim security on the same property in the same rank and degree, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry as aforesaid: Provided always, that if the certificate of registry shall be lost or mislaid, or shall be detained by any person whatever, so that the indorsement cannot in due time be made thereon, and proof thereof shall be made by the purchaser or mortgagee, or his known agent, to the satisfaction of the commissioners of his Majesty's customs, it shall be lawful for the said commissioners to grant such further time as to them shall appear necessary for the recovery of the certificate of registry, or for the registry *de novo* of the said ship or vessel under the provisions of this act, and thereupon the collector and controller shall make a memorandum in the book of registers of the further time so granted, and during such time no other bill of sale shall be entered for the transfer of the same ship or vessel, or the same share or shares thereof, or for giving the same security thereon.

Nature of the priority intended in this act.

Provision in case certificate be mislaid.

XXXVII. And be it further enacted, that if the certificate of registry of such ship or vessel shall be produced to the collector and controller of any port where she may then be, after any such bill of sale shall have been recorded at the port to which she belongs, together with such bill of sale, containing a notification of such record, signed by the collector and controller of such port as before directed, it shall be lawful for the collector and controller of such other port to indorse on such certificate of registry, (being required so to do), the transfer mentioned in such bill of sale, and such collector and controller shall give notice thereof to the collector and controller of the port to which such ship or vessel belongs, who shall record the same in like manner as if they had made such indorsement themselves, but inserting the name of the port at which such indorsement was made: Provided always, that the collector and controller of such other port shall first give notice to the collector and controller of the port to which such ship or vessel belongs, of such requisition made to them to indorse the certificate of registry, and the collector

Bills of sale may be produced after entry at other ports than those to which vessels belong, and transfers indorsed on certificate of registry.

Previous notice to be given to officers at the port of registry.

OF A SHIP.

and controller of the port to which such ship or vessel belongs shall thereupon send information to the collector and controller of such other port, whether any and what other bill or bills of sale have been recorded in the book of the registry of such ship or vessel, and the collector and controller of such other port, having such information, shall proceed in manner directed by this act in all respects to the indorsing of the certificate of registry, as they would do if such port were the port to which such vessel belonged.

If upon registry *de novo* any bill of sale shall not have been recorded, it shall then be produced.

XXXVIII. And be it further enacted, that if it shall become necessary to register any ship or vessel *de novo*, and any share or shares of such ship or vessel shall have been sold since she was last registered, and the transfer of such share or shares shall not have been recorded and indorsed in manner hereinbefore directed, the bill of sale thereof shall be produced to the collector and controller of his Majesty's customs, who are to make registry of such ship or vessel, otherwise such sale shall not be noticed in such registry *de novo*, except as hereinafter excepted: Provided always, that upon the future production of such bill of sale, and of the existing certificate of registry, such transfer shall and may be recorded and indorsed as well after such registry *de novo* as before.

Upon change of property registry *de novo* may be granted, if desired.

XXXIX. And be it further enacted, that if upon any change of property in any ship or vessel the owner or owners shall desire to have the same registered *de novo*, although not required by this act, and the owner or proper number of owners shall attend at the custom-house at the port to which such ship or vessel belongs for that purpose, it shall be lawful for the collector and controller of his Majesty's customs at such port to make registry *de novo* of such ship or vessel at the same port, and to grant a certificate thereof, the several requisites hereinbefore in this act mentioned and directed being first duly observed and complied with.

Copies of declarations, &c., and of extracts from books of registry, admitted in evidence.

XL. And whereas great inconvenience has arisen from the registering officers being served with subpœnas, requiring them to bring with them and produce, on trials in courts of law, relative to the ownery of vessels, or otherwise, the oaths or declarations required to be taken by the owners thereof prior to the registering thereof, and the books of registry, or copies or extracts therefrom: And whereas it would tend much to the dispatch of business if the attendance of such registering officers with the same upon such trials were dispensed with; be it therefore enacted, that the collector and controller of his Majesty's customs at any port or place, and the person or persons acting for them respectively, shall, upon every reasonable request by any person or persons whomsoever, produce and exhibit for his, her, or their inspection and examination any oath or declaration sworn or made by any such owner or owners, proprietor or proprietors, and also any register or entry in any book or books of registry required by this act to be made or kept relative to any ship or vessel, and shall, upon every reasonable request by any person or persons whomsoever, permit him, her, or them to take a copy or copies, or an extract or extracts, thereof respectively; and that the copy and copies of any such oath or declaration, register or entry, shall, upon being proved to be a true copy or copies thereof respectively, be allowed and received as evidence upon every trial at law, without the production of the original or originals, and without the testimony or attendance of any collector or controller, or other person or persons acting for them respectively, in all cases as fully, and to all in-

tents and purposes, as such original or originals, if produced by any collector or collectors, controller or controllers, or other person or persons acting for them, could or might legally be admitted or received in evidence.

Vessels or shares sold in the absence of owners without formal powers.

XLI. And be it further enacted, that if the ship or vessel, or the share or shares of any owner thereof who may be out of the kingdom, shall be sold in his absence, by his known agent or correspondent under his directions, either expressed or implied, and acting for his interest in that behalf, and such agent or correspondent who shall have executed a bill of sale to the purchaser of the whole of such ship or vessel, or of any share or shares thereof, shall not have received a legal power to execute the same, it shall be lawful for the commissioners of his Majesty's customs, upon application made to them, and proof to their satisfaction of the fair dealings of the parties, to permit such transfer to be registered, if registry *de novo* be necessary, or to be recorded and indorsed, as the case may be, in manner directed by this act as if such legal power had been produced; and also, if it shall happen that any bill of sale cannot be produced, or if, by reason of distance of time, or the absence or death of parties concerned, it cannot be proved that a bill of sale for any share or shares in any ship or vessel had been executed, and registry *de novo* of such ship or vessel shall have become necessary, it shall be lawful for the commissioners of his Majesty's customs, upon proof to their satisfaction of the fair dealings of the parties, to permit such ship or vessel to be registered *de novo*, in like manner as if a bill of sale for the transfer of such share or shares had been produced: Provided always, that in any of the cases herein mentioned, good and sufficient security shall be given to produce a legal power or bill of sale within a reasonable time, or to abide the future claims of the absent owner, his heirs and successors, as the case may be; and at the future request of the party whose property has been so transferred, without the production of a bill of sale from him or from his lawful attorney, such bond shall be available for the protection of his interest, in addition to any powers or rights which he may have in law or equity against the ship or vessel, or against the parties concerned, until he shall have received full indemnity for any loss or injury sustained by him.

Commissioners may permit record of such sales, or registry *de novo*, as the case may require; —and in other cases where bills of sale cannot be produced.

Security being given to produce legal powers, or abide future claims.

Transfer by way of mortgage.

XLII. And be it further enacted, that when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage or of assignment to a trustee or trustees for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and controller of the port where the ship or vessel is registered shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry in manner hereinbefore directed, state and express, that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not, by reason thereof, be deemed to be the owner or owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel any more than if no such transfer had been made, except so far as may be necessary for the

Mortgagee not to be deemed an owner.

OF A SHIP.

purpose of rendering the ship or vessel, share or shares so transferred, available, by sale or otherwise, for the payment of the debt or debts for securing the payment of which such transfer shall have been made.

Transfers of ships for security of debts, being registered, rights of mortgagee not affected by any act of bankruptcy of mortgagor, &c.

XLIII. And be it further enacted, that when any transfer of any ship or vessel, or of any share or shares thereof, shall have been made as a security for the payment of any debt or debts, either by way of mortgage or of assignment as aforesaid, and such transfer shall have been duly registered according to the provisions of this act, the right or interest of the mortgagee or other assignee as aforesaid shall not be in any manner affected by any act or acts of bankruptcy committed by such mortgagor or assignor, mortgagors or assignors, after the time when such mortgage or assignment shall have been so registered as aforesaid, notwithstanding such mortgagor or assignor, mortgagors or assignors, at the time he or they shall so become bankrupt as aforesaid, shall have in his or their possession, order, and disposition, and shall be the reputed owner or owners of the said ship or vessel, or the share or shares thereof so by him or them mortgaged or assigned as aforesaid, but that such mortgage or assignment shall take place of and be preferred to any right, claim, or interest which may belong to the assignee or assignees of such bankrupt or bankrupts in such ship or vessel, share or shares thereof, any law or statute to the contrary thereof notwithstanding.

VI.

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MORTGAGE *of* COPYRIGHT *and of the unsold* COPIES *of* BOOKS *to secure the payment of* BILLS *of* EXCHANGE (*a*).

Parties.

THIS INDENTURE made, &c., BETWEEN A. B., of &c., and C. D., of &c., booksellers and publishers, and co-partners, [*mortgagors*], of the one part, and E. F., of &c., and G. H., of &c., papermakers and co-partners, [*mortgagees*], of the other part. WHERE-

Mortgage for money secured by bills of exchange —question, whether the bills are discounted or deposited.

(*a*) In making a mortgage, as part of an arrangement in which bills of exchange are given by the mortgagor to the mortgagee, the nature of the arrangement should be very distinctly understood. If, as in the present case, the bills are simply drawn by the mortgagee upon the mortgagor, and the mortgage is made to secure payment of these bills when due, no question is likely to arise. But if third persons are the drawers, acceptors, or indorsers of the bills, the essential distinction between the deposit with and the discount of the bills by the mortgagees must be borne in mind. If bills be deposited as a security for a debt, and the depositor become bankrupt, the bills must be sold, and the creditor can only prove for the residue not paid out of the proceeds of the sale; but if the creditor discount the bills, they become his property, and on the bankruptcy of the mortgagor he may prove for the whole amount of his debt, and at the same time recover on the bills against third parties. ***Ex parte Twogood***, 19 Ves. 229. This shews, that if the question is as to an advance

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AS, by an indenture bearing date the —— day of ——, and made or expressed to be made between the said A. B. and C. D., of the one part, and the said E. F. and G. H., of the other part; After reciting (among other things) that the said A. B. and C. D. had for some time past carried on and then carried on the business of booksellers and publishers at —— aforesaid in co-partnership, And that the said A. B. and C. D., as such co-partners, were the proprietors and entitled to the copyright of a book entitled ——, and that the said A. B. and C. D. as such copartners as aforesaid were the proprietors and then entitled to the copyright of the —— first numbers or parts then already published of a book entitled "a Dictionary, &c.," edited by W. X., and under the arrangements entered into by the said A. B. and C. D. with the said W. X., and by the said W. X. with the several contributors to the said Dictionary, were or would become the proprietors, and entitled to the copyright of all the remaining numbers thereafter to be published of the said Dictionary, as and when the several articles to be furnished to the said Dictionary by the several contributors aforesaid should be respectively delivered and paid for; And that the said A. B. and C. D. were possessed of and entitled to the copies remaining unsold of the said first —— numbers or parts of the said Dictionary, amounting in the whole to —— or thereabouts, the greater part whereof were then in the hands of X. Y., of &c., the printer thereof. It was witnessed, &c., [*Covenant to pay money then due, and money afterwards to become due for paper to be supplied.—Mortgage of the books, and the copies referred to, to secure the same.*] AND WHEREAS, &c., [*Recital of a second mortgage of the same copyrights and copies and of other books.*] AND WHEREAS, since the date and execution of the lastly hereinbefore-recited indenture, the remaining numbers or parts have been published of the said Dictionary, and the work has been completed, and the said A. B. and C. D. are now (subject to the mortgages thereof made by the hereinbefore-recited indentures) the proprietors, and entitled to the copyright of the same work, and to the copies amounting to ——, or thereabouts,

Recital of two prior mortgages between the same parties of parts of the property now to be mortgaged;

—of one of the works previously mortgaged having been completed;

of money on the security partly of bills of exchange, and partly of a mortgage, the lender should not take the bills in deposit, with a mortgage to secure their payment, but should discount the bills and take the mortgage to secure the amount paid by way of discount. As to evidence of the intention, whether it be deposit or discount, see *Ex parte Twogood*, ubi supra. Indorsement of the bills is primâ facie evidence of an absolute transfer of the bills. *Id.*

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now remaining unsold of the same work. AND WHEREAS, since the date and execution of the lastly hereinbefore-recited indenture, a supplement has been published to "——" in the said schedule thereto, and in the first schedule to these presents mentioned, and the said A. B. and C. D. are now the proprietors of and entitled to one-half of the copyright thereof. AND WHEREAS the said A. B. and C. D. are (subject as hereinbefore is mentioned) the proprietors of and entitled to the entirety of —— copies, or thereabouts, of —— aforesaid, and to the entirety of —— copies, or thereabouts, of the said supplement thereto, and to the entirety of —— copies, or thereabouts, of —— in the said schedule to the said lastly hereinbefore-recited indenture and the said first schedule to these presents mentioned, and to the entirety of —— copies, or thereabouts, of —— in the same schedule mentioned, and to the entirety of —— copies, or thereabouts, of —— in the same schedule mentioned. AND WHEREAS the copies of or to which the said A. B. and C. D. are proprietors and entitled as aforesaid, of the said Dictionary and of the several other works hereinbefore mentioned, are now in the hands of the said X. Y., the printer thereof (*b*). AND WHEREAS the said copies of the said Dictionary are alleged by the said X. Y. to be subject to his lien thereon for printing the said Dictionary to the amount of £——, or thereabouts, but such lien is subject as against the said E. F. and G. H. to be reduced by the value of —— copies of the said Dictionary which were given up by the said X. Y. to the said A. B. and C. D. without the authority of the said E. F. and G. H., and after notice of the said hereinbefore-recited securities had been given to the said X. Y., and the said copies of the other works hereinbefore mentioned, or of some of them, are alleged by the said X. Y. to be subject to his lien for printing the same respectively for various sums. AND WHEREAS, &c., [*Recitals shewing the amounts now due from the mortgagors to the mortgagees upon the previous mortgages and otherwise.*] AND WHEREAS the said sums of £——, £——, £——, and £——, amount together to the sum of £——, and it being inconvenient to the said A. B. and C. D. immediately to pay the same, it has been agreed that the same shall be repaid by monthly instalments of £—— each, together with interest on such instalments from the day of the date of these presents until the pay-

—of the publication of a supplement to another of the works;

—of the mortgagor's interest in the works to be mortgaged;

—of the copies being in the printer's hands;

—and subject to his lien thereon for printing them;

—of the amounts due from the mortgagors to the mortgagees;

—of the agreement for the payment of the entire debt by monthly instalments;

(*b*) As to lien by usage of trade, see Coote on Mortgages, p. 364, (second edition).

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ment of the same respectively, and that the first of such instalments shall be paid on the —— day of —— next, provided nevertheless that the last of such instalments which will become payable on the —— day of ——, 18—, shall be of £—— principal money, and the interest thereon. AND WHEREAS it was further agreed, that the due payment of the said sum of £—— with interest as aforesaid, at the times and in manner aforesaid, should be secured by bills of exchange for the said several instalments to be drawn by the said E. F. and G. H. upon and accepted by the said A. B. and C. D., and also by these presents. AND WHEREAS, in pursuance of the said agreement in this behalf, the said A. B. and C. D. have accepted the several bills bearing even date with these presents, drawn upon them by the said E. F. and G. H. for the several instalments of principal money and interest aforesaid, and in the second schedule hereunder written particularly mentioned. NOW THIS INDENTURE WITNESSETH, that, in further pursuance of the said agreement in this behalf, and in consideration of the said sum of £—— so owing to the said E. F. and G. H. by the said A. B. and C. D. as aforesaid, they the said A. B. and C. D. do, and each of them doth, by these presents assign and confirm unto the said E. F. and G. H., their executors, administrators, and assigns, ALL THAT the said book intituled ——, and the copyright thereof, AND ALSO all that the said book intituled "a Dictionary &c.," and the copyright thereof, and of all the articles and parts thereof, and all and singular the copies already printed of the said book, and now remaining unsold as aforesaid; AND ALSO, all those the parts, shares, or interests mentioned in the said first schedule to these presents, and all other the parts, shares, and interests (if any) of them the said A. B. and C. D., or either of them, in the said several books mentioned in the said first schedule to these presents, and in the copyrights thereof; AND ALSO all and singular the copies of and to which the said A. B. and C. D. are proprietors and entitled as aforesaid of the same several books; AND ALSO all that the half part and other the part, share, or interest (if any) of them the said A. B. and C. D., or either of them, of the said supplement to ——, and all and singular the copies of and to which the said A. B. and C. D. are proprietors and entitled as aforesaid of the same, AND ALL THE ESTATE, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of them the said A. B. and C. D., and each of them, of, in,

—to be secured by bills of exchange and the present indenture;

—of the bills of exchange having been accepted.

Witnesseth assignment of the copyright and copies.

And all the estate, &c.

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to, or out of, or upon the same premises, or any of them, or any part thereof; AND ALSO, all and singular the powers and authorities, privileges, profits, emoluments, and advantages whatsoever, appertaining or belonging thereunto, or in anywise to be had or made therefrom, TO HAVE AND TO HOLD the said books, copyrights, parts, shares, interests, and copies, and all and singular other the premises hereinbefore assigned or expressed and intended so be, unto the said E. F. and G. H., their executors, administrators, and assigns, in as full, ample, and beneficial a manner in all respects as they the said A. B. and C. D., or either of them, might or could have held or enjoyed the same if these presents, and the two several hereinbefore-recited indentures, had not been made and executed, and freed and discharged from all right or equity of redemption under the hereinbefore-recited indentures, or either of them, but subject nevertheless to the proviso for redemption hereinafter contained, (that is to say): PROVIDED ALWAYS, and it is hereby agreed and declared, between and by the said E. F. and G. H. and the said A. B. and C. D., and the true intent and meaning of them and of these presents is, that if the said A. B. and C. D., their executors, administrators, or assigns, shall pay or cause to be paid unto the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, the said several bills of exchange mentioned in the said second schedule to these presents on the days on which the same respectively shall become due and payable without any deduction or abatement thereout, for, or upon any account whatsoever, then and in such case they the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, shall and will at any time after all such payments shall have been so made as aforesaid upon the request and at the costs and charges of the said A. B. and C. D., their executors, administrators, or assigns, re-assign the said premises hereinbefore assigned, or expressed and intended so to be, unto the said A. B. and C. D., their executors, administrators, and assigns, or as they shall direct, free from all incumbrances whatsoever made, done, or committed by the said E. F. and G. H., or either of them, their or either of their executors, administrators, or assigns, or any of them, so as for the doing thereof, the said E. F. and G. H., or either of them, their or either of their executors, administrators, or assigns, or any of them, be not compelled or obliged to

And all powers.

Habendum to the mortgagees.

Proviso for redemption.

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go or travel from the place or places of their or any of their usual abode or dwelling: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties to these presents that immediately or at any time after payment shall have been duly made of each of the aforesaid bills of exchange at the time at which the same shall become payable (provided that all and singular the covenants, conditions, and agreements in these presents contained, and on the part of the said A. B. and C. D., their executors, administrators, and assigns, to be observed and performed up to such time, shall have been duly and sufficiently observed and performed), they the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, shall and will authorize the said X. Y., his executors, administrators, or assigns, to give up to the said A. B. and C. D., their executors, administrators, or assigns, —— copies of the said Dictionary, —— copies of the said ——, and —— copies of the said ——: PROVIDED ALWAYS, nevertheless, and it is hereby agreed and declared, that the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, shall not by reason of having given any such authority as aforesaid lose their right to or security over the copies authorized to be given up until the same shall have been actually given up to the said A. B. and C. D., their executors, administrators, or assigns: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said sum of £—— intended to be hereby secured, and the said several bills of exchange given for payment thereof as aforesaid, belong to the said E. F. and G. H., upon a joint co-partnership account, and that the said E. F. and G. H. are and shall be considered to remain jointly entitled to the same in equity as well as at law, and accordingly that the receipts of the survivor of them, the said E. F. and G. H., or of the executors or administrators of such survivor, or of their or his assigns, shall be effectual discharges for the said sum of £——, and every part thereof, and the interest for the same: AND THE SAID A. B. and C. D. do hereby, for themselves, their heirs, executors, and administrators, and each of them, doth hereby, as a separate covenant for himself, his heirs, executors, and administrators, covenant with the said E. F. and G. H., their executors and administrators, that they, the said A. B. and C. D., now have in themselves good right, full power, and lawful and

Proviso, that, on the payment of each of the bills of exchange, a certain number of copies shall be given up to the mortgagors.

Mortgagees not to lose their right over any copies not actually given up.

Proviso, that the money belongs to the mortgagees on a joint account.

Covenants by the mortgagor for right to assign;

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absolute authority to assign the said premises hereinbefore assigned, or expressed and intended so to be, in manner aforesaid, according to the true intent and meaning of these presents: AND FURTHER,

—and for further assurance;

that the said A. B. and C. D., and each of them, their and each of their executors and administrators, and all and every other person and persons having or claiming, or who shall or may have or claim, any estate, right, title, interest, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said premises hereinbefore assigned, or expressed and intended so to be, or any of them, or any part thereof, shall and will from time to time and at all times hereafter, upon every reasonable request to be made for that purpose by the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, but at the costs and charges of the said A. B. and C. D., their executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, assignments, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely assigning and assuring the said premises hereinbefore assigned, or expressed and intended so to be, and every part thereof, unto the said E. F. and G. H., their executors, administrators, and assigns, in manner aforesaid, according to the true intent and meaning of these presents, as by the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, or their or his counsel in the law, shall be reasonably advised, or devised and required; AND PARTICULARLY THAT they, the said A. B. and C. D., their executors or administrators, shall and will forthwith pay and discharge all such of the said monies for which a lien is claimed by the said X. Y., as aforesaid, as are now, according to the usual credit allowed for printing, actually due to the said X. Y., for printing the several works aforesaid, or any of them respectively, and shall and will punctually and in due course, as the same, according to the ordinary course of trade, shall become actually due and payable, pay and discharge all such of the said monies for which a lien is claimed by the said X. Y. as aforesaid, as are now owing, and shall, according to the usual credit allowed for printing, hereafter become due and payable to the said X. Y., his executors or administrators, for printing the several works aforesaid, or any of them respectively; AND FURTHER,

—and, particularly, to pay, in due course, all monies for which the printer has or shall have a lien;

—and to keep

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that they, the said A. B. and C. D., their executors, administrators, and assigns, shall and will at all times, so long as any principal money or interest shall remain on the security intended to be hereby made, keep all and singular the copies hereinbefore assigned, or expressed and intended so to be, and which shall not, for the time being, have been sold or given up, under or by virtue of these presents, well and sufficiently insured against loss or damage by fire, by a policy or policies of insurance for a sum or sums not less in the whole than the value at the sale price of the copies for the time being, to be insured and to be effected in the names or name of the said A. B. and C. D., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, in some office for insurance in London or Westminster; And that the said A. B. and C. D., their executors, administrators, or assigns, shall and will, immediately after such policy or policies shall have been effected, or immediately after the execution of these presents, if the same shall have been previously effected, leave and deposit the same with the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, and shall and will, from time to time, duly and punctually pay all and singular the premium or premiums, duty, and other sums of money necessary for keeping on foot the said policy or policies, and shall and will make such payments on the first or earliest day on which the same respectively ought to be paid, in order to keep on foot the said policy or policies, and shall and will forthwith deliver the receipt for every such payment unto the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns: AND THAT it shall be lawful for the said E. F. and G. H., or the survivor of them, and the executors or administrators of such survivor, their or his assigns, in case the said A. B. and C. D., their executors, administrators, or assigns, shall neglect or refuse to make such payments as aforesaid, or any of them, at any time or times to pay such annual premium or premiums, duty, and other sum and sums of money as aforesaid, so as to keep on foot the said policy or policies of insurance; and in case the same shall not be effected, or shall at any time become void or shall not continue on foot, then to insure and keep insured the said premises in any office or offices for insuring against loss or damage by fire, in London or Westminster, in any sum or sums not exceeding the aforesaid value of

the copies insured against fire;

—and that, on default, mortgagees may insure;

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the copies for the time being to be insured, and to pay all expenses of effecting such insurance or insurances, and the annual premium or premiums, duty, and sum and sums of money which shall from time to time become payable, for keeping on foot such insurance or insurances; AND THAT the said A. B. and C. D., their executors or administrators, shall and will, from time to time, on demand, pay or cause to be paid to the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, all and every such sum and sums of money as shall have been paid or advanced by them or him in or towards payment of any such premium or premiums, duty, or sum or sums of money, or expenses, with interest for the same after the rate of £5. per cent. per annum, from the time or respective times of the same having been advanced or paid; AND THAT, in the meantime, and until such sum or sums of money shall be so repaid, with interest as aforesaid, all and singular the said premises hereinbefore assigned, or expressed and intended so to be, shall stand and be charged with, and shall not be redeemed or redeemable until full payment shall have been made, as well of such sum or sums of money, and the interest thereon, as of the said bills of exchange, the payment whereof is intended to be hereby secured as aforesaid: AND IT IS HEREBY further provided and declared, that it shall be lawful for the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, at any time or times hereafter, without any further consent on the part of the said A. B. and C. D., their executors, administrators, or assigns, or any of them, to make sale and dispose of the said books, copyrights, parts, shares, interests, copies, and premises hereinbefore assigned, or expressed and intended so to be, or any of them, or any part or parts thereof, either together or separately, and as to the said copies of books, either by public auction or private contract, but as to the said copyright, by public auction only, with full power, upon any such sale or sales, to make any stipulations which they or he shall deem necessary; And also with full power to buy in the said premises, or any of them, or any part or parts thereof, at any sale or sales by public auction, or to rescind any contract or contracts for the sale of the same premises, or any part thereof, and to re-sell the premises which shall have been so bought in, or as to which any contract or contracts for sale shall have been rescinded as aforesaid, without being respon-

—and that mortgagors will repay all money paid for such insurance, with interest;

—and that, till repayment, the same shall be a charge on the mortgaged premises.

Power of sale.

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sible for any loss which may be occasioned thereby, and that for the purposes aforesaid, or any of them, it shall be lawful for the said E. F. and G. H., and the survivor of them, and the executors or administrators of such survivor, their or his assigns, to make and execute, or cause to be made and executed, all such agreements, deeds, assignments, and assurances, as they or he shall think fit: PROVIDED ALSO, and it is hereby agreed and declared that the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, will not and shall not execute the power of sale hereinbefore contained, unless and until default shall have been made in payment of some one of the bills of exchange in the said second schedule to these presents mentioned, on the day on which the same shall become due or payable, or in the observance or performance of some covenant herein contained, and on the part of the said A. B. and C. D., or one of them, their or one of their executors, administrators, or assigns, to be observed or performed: PROVIDED ALSO, and it is hereby agreed and declared, that upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers shall not be bound to see or enquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or whether any money remains due on the security of these presents, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety or regularity of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as far as regards the safety and protection of the purchaser or purchasers, be deemed and taken to be within the aforesaid power in that behalf, and be valid and effectual accordingly, and the remedy of the said A. B. and C. D., their executors, administrators, or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, shall be in damages only: AND IT IS HEREBY also agreed and declared, that, upon any such sale as aforesaid, the receipt or receipts in writing of the said E. F. and G. H., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, for the purchase-money of the premises to be sold, shall be an effectual discharge or effectual discharges for the money therein respectively expressed to be received, and that such purchaser or purchasers, after payment of his or their purchase-money, shall not be concerned to see to the application of such money, nor be answerable for any loss, mis-

Power of sale not to be exercised till default in payment of some bill of exchange or observance of some covenant.

Purchaser not to be concerned to see that default has been made.

Receipts of the mortgagees to be discharges to purchasers.

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application, or non-application thereof: AND IT IS HEREBY further agreed and declared, that the said E. F. and G. H., and the survivor of them, and the executors or administrators of such survivor, their or his assigns, shall hold all and singular the monies which shall arise from any sale which shall be made in pursuance of the aforesaid power in that behalf upon the trusts following, (that is to say), UPON TRUST, in the first place, by, with, or out of the same monies to reimburse themselves or himself, or pay or discharge all the costs and expenses attending such sale, or otherwise to be incurred in or about the exercise of the said power of sale, or in anywise relating thereto, or otherwise in respect of the premises; AND, in the next place, upon trust, to apply such monies in or towards satisfaction of all and singular the monies which, for the time being, shall be due or owing on the security of these presents, but so, nevertheless, that as to the amounts secured by any of the said bills of exchange which shall not then have become actually due and payable, a proper discount shall be allowed, at the rate at which the interest was calculated for the same as aforesaid, AND THEN, upon trust, to pay the surplus (if any) of the said monies which shall arise from any such sale as aforesaid, unto the said A. B. and C. D., their executors, administrators, or assigns, for their proper use and benefit: AND IT IS HEREBY also agreed and declared, that the aforesaid power of sale shall and may be exercised by any person or persons who, for the time being, shall be entitled to receive, and give a discharge for the monies which, for the time being, shall be due or owing on the security of these presents: PROVIDED ALWAYS, and it is hereby agreed and declared, that the said E. F. and G. H., or either of them, their or either of their executors, administrators, or assigns, shall not be answerable or accountable for any involuntary losses which may happen in or about the exercise or execution of the aforesaid power and trusts, or any of them; PROVIDED ALSO, and it is hereby agreed and declared, that the aforesaid power of sale, or any thing herein contained, shall not in anywise prejudice or affect the right of the said E. F. and G. H., or of the survivor of them, or of the executors or administrators of such survivor, their or his assigns, to foreclose the equity of redemption of the premises aforesaid, or of the unsold part thereof for the time being: PROVIDED ALWAYS, nevertheless, and it is hereby expressly agreed and declared, between and by the parties to these presents, that nothing in these presents contained shall be deemed or construed to give the said X. Y. any

Trusts of the purchase-money.

Power may be exercised by any person entitled to give a receipt for the purchase-money.

Mortgagees not to be answerable for involuntary losses.

Power of sale not to affect the right of foreclosure.

The printer's lien not to be extended by the present mortgage.

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further or other lien or right upon any of the aforesaid copies of the said Dictionary, or any of them, or upon any of the copies of the other works aforesaid, or any of them, than the said X. Y. now has, or is entitled to, and particularly, that the lien forfeited by the said X.Y., as against the said E. F. and G. H., by his having given up —— copies of the said Dictionary as aforesaid, shall not be restored by these presents: AND IT IS HEREBY lastly declared, that the total amount of the principal monies originally secured by the said indenture of the —— day of —— 18—, and the —— day of —— 18—, or one of them, and for which these presents are intended as a further security, is the sum of £——, and that the total amount of principal monies for which these presents are intended as an original security is the sum of £——. IN WITNESS, &c. (*c*).

Declaration as to the total amount of money originally secured by this mortgage.

FIRST SCHEDULE referred to in the above written indenture.

SECOND SCHEDULE referred to in the above written indenture.

(*c*) The law of copyright, till lately, depended principally on the stat. 8 Ann. c. 19, which required that every assignment of copyright should be in writing. *Power* v. *Walker*, 3 Mau. & Sel. 7; *Colburn* v. *Duncombe*, 9 Sim. 151. This act, however, and some acts by which it was amended, have been repealed by the act 5 & 6 Vict. c. 45—the act by which the law of copyright is now regulated.

Law of copyright before the statute 3 & 4 Vict. c. 45.

By this act (sect. 3), the copyright of every book published after the passing of the act is to endure in any event for an absolute term of forty-two years from the first publication; and if the book be published in the author's lifetime, the copyright is to endure for his life, and seven years after his death, or for forty-two years absolute, whichever may be the longest term. By the 41st section, the benefit of the act is extended with certain exceptions to books then already published, and the copyright of books coming within the exceptions, it is enacted, shall endure for the term subsisting at the passing of the act.

Existing law of copyright. Term of copyright. Property of copyright.

By the 3rd and 4th sections, the copyright is declared to be the property of the author and his assigns, or, in the event of publication after his death, "of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."

Copyright, personal property.

By the 25th section, copyright is declared to be personal property, and to be transmissible by bequest, and, in the case of intestacy, to be subject to the same law as other personal property.

Registry of proprietorship and assignment of copyright.

The 11th section provides for a registry, at Stationers' Hall, of the proprietorship in the copyright of books and assignments thereof, and of licenses affecting such copyright, and declares that certified copies of such proprietorship, assignments, and licenses shall be primâ facie evidence thereof: and the 12th section declares that every registered proprietor may assign his interest

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by an entry in the registry in the form specified in the schedule, as effectually as if the assignment were by deed. It should be observed on this, that, before the passing of this act, a deed was not necessary for the assignment of copyright, and notwithstanding this provision, there can be no question that an assignment by writing will be still sufficient. The act, it will be observed, does not preclude proprietors from assigning their copyright by other means than an entry in the registry, and does not expressly authorize assigns to assign by that mode. In cases where the proprietorship is simple, and the assignment absolute, it will probably be often effected by an entry in the register; but where the interests in the proprietorship are numerous or complicated, or the assignment conditional, or upon trusts, or for any special purposes, a formal instrument with recitals and clauses will be necessarily used. A mortgage must of course always be made by a formal instrument, and when covenants for title are desired, a deed is essential. Still, in all cases, an entry of the assignment should be made in the registry, and in all dealings with copyright, the registry must be searched to ascertain the proprietorship and the assignments. No remedy for infringement of copyright can be had till the book has been registered; see sect. 24.

Copyright in the articles of encyclopædias, magazines, &c.

The 18th section of the act provides for the case of encyclopædias, magazines, and other works published in parts, or made up of articles, as in the case of the dictionary which forms part of the subject of the foregoing precedent. Under the old acts it was necessary to take an assignment from the authors of the several articles; but the new act, if there be a general agreement to that effect, vests the copyright of the articles, when paid for, in the proprietor, projector, publisher, or conductor of the work, as the agreement may direct, providing, however, that the right to publish articles in magazines, &c. in a separate form shall revert to the author, (*query*, or his representatives), after twenty-eight years from the original publication, and that the proprietor, &c. of the original publication shall have no right, during such twenty-eight years, to publish the articles in a separate form.

Meaning of words in the interpretation of the act.

The 2nd section of the act declares that the word "Book" shall include "every Volume, Part, or Division of a Volume, Pamphlet, Sheet of Letter-press, Sheet of Music, Map, Chart, or Plan separately published," and that "Copyright" shall mean "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied."

Dramatic pieces and musical compositions.

The 20th and some other sections of the act extend the provisions of it to dramatic pieces and musical compositions.

References as to the law of copyright.

A good deal of information with respect to copyright as it existed under the old law will be found in Evans's statutes, vol. 2, pp. 13—27.

Copyright of works published abroad and by aliens.

With respect to the copyright of works published abroad and by aliens in this country, see *Delond* v. *Shaw*, 2 Sim. 237; *Page* v. *Townshend*, 5 Sim. 395; *Clementi* v. *Walker*, 2 B. & C. 861; *D'Almaine* v. *Boosey*, 1 You. & Coll. 288; *Bentley* v. *Foster*, 10 Sim. 329; *Chappell* v. *Purday*, 4 You. & Coll. 485.

Infringement of copyright and piracy.

With respect to what is piracy or an infringement of copyright, and the nature of the remedies, see 2 Evans's Statutes, ubi supra, *Lewis* v. *Fullarton*, 2 Beav. 6; *Lewis* v. *Chapman*, 3 Beav. 133; *Campbell* v. *Scott*, 11 Sim. 31; *Saunders* v. *Smith*, 3 My. & Cra. 711; and the act 5 & 6 Vict. c. 45, sects. 14, 15, & 23.

VII.

MORTGAGE *to secure the Repayment of* STOCK (*a*), *and the Payment of Annual Sums in Lieu of* DIVIDENDS *in the meantime.* FOR STOCK.

THIS INDENTURE, made the —— day of —— 18—, BETWEEN A. B., of &c. [*mortgagor*], of the one part, and C. D., of &c., and E. F., of &c. [*mortgagees*], of the other part [*Recitals of title*]: AND WHEREAS the said C. D. and E. F., at the request of the said A. B., have this day sold out the sum of £——, £—— per Cent. —— Bank Annuities standing in their names, and have paid the sum of £——, the net money produced by such sale, to the said A. B.: AND WHEREAS, before making such sale and payment as aforesaid, it was agreed that the reinvestment of the said sum of £——, £—— per Cent. —— Bank Annuities, and the payment, in the meantime, of such sums of money as the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, would have been entitled to receive as and for the dividends of the said sum of £——, £—— per Cent. —— Bank Annuities, in case the same had not been so sold as aforesaid, should be secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sale so made by the said C. D. and E. F. of the said sum of £——, £—— per Cent. Reduced Bank Annuities, and the payment of the said sum of £—— to the said A. B. as aforesaid, (the receipt of which said sum he, the said A. B., doth hereby acknowledge, and of and from the same, and every part thereof, doth acquit, release, and discharge the said C. D. and E. F.,

Parties.

Recital of sale of stock by intended mortgagees, and payment of the produce to the mortgagor;

—of the agreement for the mortgage.

Witnesseth covenant to repurchase the stock, and pay money in lieu of dividends in the meantime.

(*a*) As to mortgages for securing the repayment of stock, see Coote on Mortgages, ch. xvii. p. 343 et seq. (2nd edit.) Almost the only case in which mortgages are now made to secure the repayment of stock, is that of trustees, who have no power to lend on mortgage, but are desirous to accommodate a cestui que trust with a loan of money, and to secure the repurchase of the exact sum of stock sold, instead of the repayment of the exact sum of money advanced. It is hardly necessary to observe, that trustees who have the usual power to lend the trust money on real security must follow their trust, and take a security for the repayment of the money lent, not a security for the repurchase of the stock sold to produce that money.

FOR STOCK.

and each of them, their and each of their heirs, executors, administrators, and assigns, for ever, by these presents), he, the said A. B., doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D. and E. F., their executors and administrators, that he, the said A. B., his heirs, executors, or administrators, shall and will, at his or their own costs and charges, on or before the —— day of ——, which will be in the year 18—, transfer, or cause to be transferred, into the names or name of the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, the sum of £——, £—— per Cent. —— Bank Annuities, and shall and will, in the meantime, until the said Bank Annuities shall be so transferred, pay or cause to be paid unto the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, (as and for and in lieu of dividends), such sums of money as they or he would have been entitled to receive, as and for the dividends of the said sum of £——, £—— per Cent. —— Bank Annuities, so sold by the said C. D. and E. F., as aforesaid, in case the same had not been so sold, but had continued in the names or name of the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, such payments to be made at such times and in such manner as such dividends would have been payable to the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, at the Bank of England, without any deduction or abatement whatsoever for or in respect of any taxes, rates, assessments, payments, or outgoings, or any other matter, cause, or thing whatsoever, [*Conveyance of hereditaments and assignment of policies of assurance by separate witnessing parts*]:

Assurance of mortgaged property.

Proviso for redemption.

PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said C. D. and E. F. and the said A. B., and the true intent and meaning of them and of these presents is, that, if the said A. B., his heirs, executors, administrators, or assigns, shall transfer, or cause to be transferred, into the names or name of the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, the aforesaid sum of £——, £—— per Cent. —— Bank Annuities, on the said —— day of —— 18—, and shall and

FOR STOCK.

do, in the meantime, pay or cause to be paid unto the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, such sums of money, as and for and in lieu of dividends, as aforesaid, at the times and in manner in the covenant hereinbefore contained mentioned for payment thereof, without any deduction or abatement whatsoever, as aforesaid, according to the true intent and meaning of these presents, then and in such case, they the said C. D. and E. F., or the survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns, shall and will at any time after such payment shall have been so made, as aforesaid, upon the request, and at the costs and charges of the said A. B., his heirs, executors, administrators, or assigns, reconvey the said hereditaments, and premises, hereinbefore released, or expressed and intended so to be, to such of the uses, and upon and for such of the trusts, intents, and purposes, in and by the said will of the said ——, limited and declared of and concerning the same, as shall, for the time being, be subsisting or capable of taking effect, and re-assign the said policies of assurance, monies, and premises, lastly hereinbefore assigned, or expressed and intended so to be, unto the said A. B., his executors, administrators, and assigns, and as to all the said premises free from all incumbrances whatsoever made or committed by the said C. D. and E. F., or either of them, their or either of their heirs, executors, administrators, or assigns, so as for the doing thereof, the said C. D. and E. F., or either of them, their or either of their heirs, executors, administrators, or assigns, be not compelled or obliged to go or travel from the place or places of their or any of their usual abode or dwelling, [*Trusts of policy money* (*b*)—*Receipt clause.*] AND THE SAID A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D. and E. F., their executors and administrators, that in case the said sum of £——, £—— per Cent. —— Bank Annuities, or any part thereof, shall not be transferred at the time in the covenant hereinbefore contained mentioned for the transfer thereof, he the said A. B., his heirs, executors, or administrators,

Covenant to pay half-yearly sums in lieu of dividends, in case the stock is not repurchased at the appointed time.

(*b*) These are trusts of the money in case of the death of the insured before the policy is re-assigned. See supra, p. 538, and the appropriate receipt clause, Vol. III. p. 616.

FOR STOCK.

shall and will, during so long as the said sum of £——, £—— per Cent. —— Bank Annuities, or any part thereof, shall remain untransferred, pay or cause to be paid to the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, (without any deduction or abatement for or in respect of any taxes, rates, assessments, payments, or outgoings, or any other matter, cause, or thing, whatsoever), such sum or sums of money, as they or he would have been entitled to receive as and for the dividends of the said sum of £——, £—— per Cent. —— Bank Annuities, or of so much thereof as shall for the time being remain untransferred, in case the same had been transferred into the names of the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, on the —— day of ——, 18—, as aforesaid, such payments to be made at such times and in such manner as such dividends would have been payable to the said C. D. and E. F., or the survivor of them, or the executors or administrators of such survivor, their or his assigns, at the Bank of England: PROVIDED ALWAYS, and it is hereby agreed and declared that the said sum of £——, £—— per Cent. —— Bank Annuities, so sold by the said C. D. and E. F. as aforesaid, belonged to them upon a joint account in equity as well as at law, and that the said C. D. and E. F. are and shall be considered to remain jointly entitled, in equity as well as at law, to the sum of £——, £—— per Cent. —— Bank Annuities, and the sums of money as and for and in lieu of dividends intended to be hereby secured, and accordingly that the receipt or receipts of the survivor of them, the said C. D. and E. F., or of the executors or administrators of such survivor, or of their or his assigns, shall be effectual discharges for the said sum of £—— £—— per Cent. —— Bank Annuities, and the sums of money hereinbefore covenanted to be paid, as and for and in lieu of dividends as aforesaid, and every part thereof respectively: [*Usual covenants for title and proviso for quiet enjoyment until default.*] IN WITNESS &c.

Proviso, that the receipt of the survivor of the mortgagees and his representatives shall be sufficient.

VIII.

TRUST *of* INCOME *for the* SEPARATE USE *of a* MARRIED WOMAN *without Power of* ANTICIPATION (*a*).

SETTLEMENTS.

Trust for separate use.

AND do and shall during the joint lives of the said [*husband*] and [*wife*] pay the dividends, interest, and annual proceeds of the said sum of £——, £—— per Cent. —— Bank Annuities, and of the monies to arise by the sale, transfer, or disposition thereof, or of any part thereof, and of the stocks, funds, and securities in or upon which the same monies, or any part thereof, may be invested to the said [*wife*] for her sole and separate use, independently and exclusively of the said [*husband*] and of his debts, control, interference, and engagements, and so that her receipts alone shall be discharges for the same, and that she shall not have power to deprive herself of the benefit thereof by sale, mortgage, charge, or otherwise in the way of anticipation.

(*a*) See supra, p. 445.

IX

CLAUSES *in a* SETTLEMENT *on the* MARRIAGE *of a* DOMICILED SCOTCHMAN.

CLAUSES IN SETTLEMENT OF A SCOTCHMAN.

Covenant by the husband, that if the wife survive him his representatives shall pay her a certain sum immediately after his death for mourning and aliment;

AND THE SAID [*husband*] doth hereby, for himself, his heirs, executors, and assigns, covenant with the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, that in case the said intended marriage shall take effect, and the said [*wife*] shall survive him the said [*husband*], then, and in such case, the heirs, executors, or administrators of him, the said [*husband*], shall and will, within one calendar month next after his decease, pay or cause to be paid the sum of £—— sterling, clear of all deductions, to the said [*wife*], for mourning and aliment for herself and family, and for the expenses of her establishment for the period that may intervene betwixt his death and the time of the first half-yearly payment of

CLAUSES IN SETTLEMENT OF A SCOTCHMAN.

the said annual sum of £—— hereinbefore provided for her becoming due; AND FURTHER, that the executors or administrators of him, the said [*husband*], do and shall, within one calendar month next after his decease, make over to the said [*wife*] the best carriage and best pair of horses that shall be belonging to him at the time of his death; AND FURTHER, that the heirs, executors, or administrators of him, the said [*husband*], shall permit and suffer the said [*wife*] to possess and enjoy, for the next twelve months after his death, all the plate, and bed and table linen that shall then be belonging to him, and for the same period, at the option of the said [*wife*], to occupy and possess either his town house and appurtenances, or such house in the country belonging to him, with the gardens and pleasure-grounds attached to such country-house as the said [*wife*] shall select, together with the furniture at his death being in such house, WHICH PROVISIONS hereinbefore contained in favour of the said [*wife*], she, with the consent and approbation of her said mother, the said ——, and of the said ——, her eldest brother, has accepted and does hereby accept in full satisfaction to her of all terce of lands, third or half of the moveables, and every other claim or provision whatever, which she could by law ask or demand of and from the said [*husband*], his heirs and successors, by and through his decease, in case she survive him, and in full satisfaction of all that her heirs, executors, or next of kin could ask or claim from the said [*husband*] on any account whatever, by and through her predeceasing him; AND WHICH provisions hereinbefore written, in favour of the child or children of the intended marriage, are hereby made, and by the said [*wife*] in like manner, and with the consent and approbation aforesaid, accepted in full of all claim competent to the said child or children for legitim, portion natural, bairns part of gear, executry, or otherwise whatever, by and through the death of their father and mother, or either of them, excepting only what the said [*husband*] may think fit of his own good will further to provide and settle for and upon the said [*wife*], and the children of the said marriage (*a*): FINALLY, it

—and make over to her his best carriage and horses;

—and allow her, for twelve months after his death, to enjoy his mansion-house, plate, linen, and furniture.

The aforesaid provisions to be in bar of the wife's terce.

And the provisions made in favour of the children to be in bar of their legitim.

Agreement

(*a*) The clauses in the text were lately settled by an eminent member of the Scotch bar, and are intended to bar the wife's right to terce, and all other share of her husband's estate, and to bar the children's right to legitim, and all other share of their father's estate. A clause to bar the wife's legitim, and all other share of her father's estate, will be found infra, Vol. IV. p. 404.

is hereby contracted and agreed on, by and between the said parties, with the consent aforesaid, that although the said marriage shall happen to be dissolved by the death of either party within the space of a year and a day after the solemnization thereof, and without a living child having been procreated of the same, yet this present contract and whole provisions herein contained in favour of either of the said parties shall subsist and continue in full force and effect in the same manner as if the marriage had subsisted beyond a year and a day, or a living child had been procreated of the same, any law or custom to the contrary notwithstanding.

CLAUSES IN SETTLEMENT OF A SCOTCHMAN.

that the settlement shall hold good, notwithstanding the death of either party within a year and a day without issue.

X.

EXTRACT *from* WILL *of* PERSONAL *Estate, declaring* TRUSTS *of the* RESIDUE *for the Testator's* CHILDREN, *and the* ISSUE *of Children dying in his lifetime per stirpes,* AND IN DEFAULT *of such Children and issue for other Persons named, or the Issue of any of them dying in the Testator's lifetime.* USUAL CLAUSES.

FOR TESTATOR'S CHILDREN AND ISSUE, AND OTHERS.

AND DO AND SHALL stand and be possessed of and interested in the residue of the said monies: IN TRUST for all and every the child and children of my body living at my death, who, being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters, shall attain that age or marry, and such of the issue living at my death of any child or children of my body who shall have died in my lifetime, leaving issue living at my death, as, being a male or males, shall attain the age of twenty-one years, or, being a female or females, shall attain that age or marry, such child, children, and issue, if more than one, to take in equal shares per stirpes, so that the issue of any child of my body dying in my lifetime as aforesaid shall take only the share which the parent of such issue would have taken, if living at my death, and attaining the age of twenty-one years, or, being a daughter, attaining that age or marrying: AND IF there shall be no child of my body living at my death who, being a son, shall attain the age of twenty-one years, or being a daughter, shall

In trust for testator's children attaining twenty-one years, or, being daughters, marrying, and the like issue of children dying in his lifetime, in equal shares per stirpes.

And in default of such children and issue.

FOR TESTATOR'S CHILDREN AND ISSUE, AND OTHERS.

attain that age or marry, and no issue of any child of my body dying in my lifetime as aforesaid, who shall be living at my death, and, being a male, shall attain the age of twenty-one years, or, being a female, shall attain that age or marry, then (except as to such parts, if any, of the said trust-monies as may have been applied under the power of advancement hereinafter contained): IN TRUST for such of them, my said father, R. B., my said brother, W. B.. and my said sister, S. B., as shall be living at my death, and such of the issue living at my death of any of them, the said R. B., W. B., and S. B., who may have died in my lifetime, leaving issue living at my death, as, being a male or males, shall attain the age of twenty-one years, or, being a female or females, shall attain that age or marry, to take in equal shares per stirpes, so that the issue of any of them, the said R. B., W. B., and S. B., who may have died in my lifetime as aforesaid, shall take only the share which the parent of such issue would have taken, if living, at my death, and so that in the case of my said father, his issue by his second wife alone shall be entitled under this present bequest: AND I HEREBY declare my will to be, that all and every the monies to which any child, children, or issue of my body, or any issue of any of them, the said R. B., W. B., and S. B., shall or may, for the time being, be entitled in expectancy under the trusts aforesaid, shall be laid out and invested by them, the said [*trustees*] or the survivors or survivor of them, or the executors or administrators of such survivor, in their or his names or name, in the purchase of a competent share or competent shares of any of the parliamentary stocks or public funds of Great Britain, or at interest upon Government or real securities in England or Wales, but not in Ireland; and I declare my will to be, that the said [*trustees*], and the survivors and survivor of them, and the executors and administrators of such survivor, do and shall, from time to time, if and when they or he shall think fit so to do, alter, vary, and transpose the said stocks, funds, and securities, and also any other stocks, funds, and securities to which any such child, children, or issue as aforesaid, shall become entitled in expectancy under the trusts hereinbefore contained, into or for other stocks, funds, or securities of the same or a like nature, at their or his discretion: AND DO AND SHALL pay and apply the whole, or such part as the said [*trustees*], and the survivors and survivor of them, and the executors and administrators of such survivor, shall

In trust for three persons named, and the issue of any of them dying in the testator's lifetime, per stirpes.

Direction to invest monies to which any children or issue may be entitled in expectancy;

—with power to vary securities.

Maintenance clause.

FOR TESTATOR'S CHILDREN AND ISSUE, AND OTHERS.

think fit, of the interest, dividends, and annual produce of the trust monies, stocks, funds, and securities, to which any such child, children, or issue as aforesaid shall or may, for the time being, be entitled in expectancy, under the trusts hereinbefore declared, for and towards the maintenance and education of such child, children, or issue respectively, in the meantime, until such, his, her, or their then expectant portions shall become payable; with power for the same trustees or trustee, for the time being, either themselves or himself, so to apply the same, or to pay the same to the guardian or guardians for the time being, of such child, children, or issue respectively, to be so applied by such guardian or guardians, without such trustees or trustee being liable to see to the application thereof, or bound to require any account of the application of the same: AND DO AND SHALL, during such suspense of absolute vesting as aforesaid, accumulate all the residue (if any) of the said interest, dividends, and annual proceeds, in the way of compound interest, by investing the same, and all the resulting income and produce thereof, from time to time, in or upon any such stocks, funds, and securities as are hereinbefore mentioned, for the benefit of the person or persons who, under the trusts herein contained, shall become entitled to the principal fund from which the same respectively shall have proceeded, with power for the said trustees or trustee, for the time being, to resort to the accumulation of any preceding year or years, and to apply the same as to such trustees or trustee shall seem meet, towards the maintenance and education of the child, children, or issue who shall, for the time being, be presumptively entitled to the same respectively, in like manner as such accumulations might have been applied under the power hereinbefore contained, in case the same accumulations had been interest, dividends, or annual produce arising from the original trust fund, in the year in which the same shall be so applied for maintenance and education: PROVIDED ALWAYS, and I hereby declare my will to be, that during the life of my said wife, the whole of the interest, dividends, and annual produce of the trust monies, stocks, funds, or securities, to which any child, children, or issue of my body, shall, for the time being, be entitled in expectancy as aforesaid, shall be paid to my said wife, to be applied by her in such manner as she shall think fit, for the maintenance, education, and benefit of such child, children, or issue, and her receipt shall be a sufficient discharge for the same,

Accumulation clause.

The interest of testator's children's expectant shares to be paid to their mother during her life, for their benefit.

FOR TESTATOR'S CHILDREN AND ISSUE, AND OTHERS.

Advancement clause.

so that the trustees or trustee, for the time being, of this my will shall not be bound or concerned, or have any right to see to the application of such interest, dividends, and annual proceeds: PROVIDED ALWAYS, and I do hereby declare my will to be, that it shall be lawful for the said [*trustees*], and the survivors and survivor of them, and the executors and administrators of such survivor, at any time or times, to levy and raise any part or parts of the portion or portions to which any such child, children, or issue as aforesaid, shall, for the time being, be entitled in expectancy under the trusts hereinbefore declared, not exceeding in the whole, for any such person, one equal moiety or half part or share of his or her then expectant portion, and to pay and apply the same for his, her, or their preferment, advancement, or benefit, in such manner as the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, shall, in their or his discretion, think fit.

XI.

BY RESIDUARY LEGATEES.

RELEASE *from the* RESIDUARY LEGATEES *to the* EXECUTORS *of the* WILL *and* CODICILS *of a Testatrix.*

Introduction.

TO ALL TO WHOM THESE PRESENTS SHALL COME, A. B., of &c., C. D., of &c., and E. F., of &c., [*residuary legatees*], severally send greeting. WHEREAS, X. Y., late of &c., widow, duly made, signed, and published her last will and testament in writing, bearing date the —— day of ——, and thereby, after giving divers specific and pecuniary legacies, as to all the rest and residue of her estate and effects whatsoever and wheresoever, and whether in possession, reversion, remainder, or expectancy, she gave and bequeathed the same unto and equally between the said A. B., C. D., and E. F., their executors, administrators, and assigns, in equal shares and proportions as tenants in common, And the said testatrix thereby nominated, constituted, and appointed the said C. D. and her, the testatrix's, nephew G. H., of &c., executors of her said will. AND WHEREAS the said testatrix duly made, signed,

Recital of the testatrix's will;

—and a codicil thereto;

BY RESIDUARY LEGATEES.

and published a codicil, bearing date the —— day of ——, to her said will, and thereby gave certain specific and pecuniary legacies, and confirmed her said will in all other respects; AND WHEREAS the said testatrix duly made, signed, and published another codicil, bearing date the —— day of ——, to her said will, and thereby gave certain pecuniary legacies, and confirmed her said will and the said first codicil thereto in every respect; AND WHEREAS the said X. Y. died on or about the —— day of ——, without having revoked or altered her said will, except in so far as the same was altered by the said codicils, and without having revoked or altered the said codicils, except so far as the first was altered by the second of the said codicils, and the said will and codicils were proved by the said C. D. and G. H. on the —— day of —— in the prerogative court of the Archbishop of Canterbury; AND WHEREAS the said C. D. and G. H., by and out of the personal estate of the said testatrix, have paid the funeral and testamentary expenses and debts of the said testatrix, and have paid or delivered, appropriated and retained, the legacies given by the said will and codicils; AND WHEREAS the whole of the personal estate of the said testatrix which remained after payment of her said funeral and testamentary expenses, and after the payment, delivery, appropriation, and retainer of the said legacies given by her said will and codicils, and all interest, dividends, and annual income which accrued on such parts of the personal estate of the said testatrix as produced any interest, dividends, or annual income, have (after payment thereout of the legacy duty thereon) been paid to or divided among them the said A. B., C. D., and E. F., in equal shares; AND WHEREAS the said A. B., C. D., and E. F., being satisfied with the accounts rendered of the said personal estate of the said testatrix, and of the disposition and application thereof, and being satisfied with the conduct of the said C. D. and G. H. in the execution of the said will and codicils, and in relation to the premises, have agreed to execute such release as is hereinafter contained. NOW THESE PRESENTS WITNESS, that, in pursuance of the said agreement, and in consideration of the premises, they the said A. B., C. D., and E. F. do, and each of them doth, by these presents, acquit, release, and discharge the said C. D. and G. H., and each of them, their and each of their heirs, executors, and administrators, estates and effects, of and from all actions, suits, accounts, reckonings, claims, and demands whatsoever for, upon account, or in respect

—and a second codicil thereto;

—of the testatrix's death, and the probate of her will and codicils;

—of the payment of her funeral and testamentary expenses, debts, and legacies;

—of the residue having been duly divided;

—of the agreement to give the release.

Witness release.

BY RESIDUARY LEGATEES.

of the administration, disposition, or application of the personal estate of the said X. Y., or any part thereof, or for or in respect of any act, deed, matter, or thing whatsoever made, done, committed, or executed, or neglected, or omitted by the said C. D. and G. H., or either of them, in or about the personal estate of the said X. Y., or any part thereof, or in anywise in the execution of the said will and codicils, or in relation thereto, or for, upon account, or in respect of any act, deed, matter, or thing whatsoever in anywise relating to the premises. IN WITNESS &c.

XII.

FOR PURCHASE UNDER THE DIRECTION OF THE COURT OF CHANCERY.

AGREEMENT *for a* PURCHASE *to be made under the* DIRECTION *of the* COURT *of* CHANCERY *with Funds in Court.*

Parties.

ARTICLES OF AGREEMENT made and entered into the —— day of —— 18—, BETWEEN A. B., of &c., and C. D., of &c., of the first part; E. F., of &c., of the second part; G. H., of &c., and I. K., of &c., of the third part; L. M., of &c., of the fourth part; and N. O., of &c., and P. Q., of &c., of the fifth part:

Recital of title to all the undivided shares but one;

WHEREAS the said A. B. and C. D. claim to be seised of or entitled, as trustees for sale, to ten undivided eleventh parts or shares of and in the manors or messuages, farms, lands, tenements, franchises, and hereditaments in the schedule hereunder written, or hereunto annexed, particularly mentioned and described for an absolute estate of inheritance in fee simple in possession, free from incumbrances, except as hereinafter mentioned:

—and of title to that share;

AND WHEREAS the said E. F. claims to be seised of, or entitled to, the remaining one undivided eleventh part or share of and in the said manors, messuages, lands, tenements, franchises, and hereditaments for an estate for her life; And the said G. H. and I. K. claim to be seised of, or entitled as trustees for sale to, the same manors, messuages, lands, tenements, franchises, and hereditaments for an estate of inheritance in fee simple, in remainder or reversion expectant on the decease of the said E. F., free from incumbrances, except as hereinafter mentioned:

—and of a

AND WHEREAS it is represented by the

FOR PURCHASE UNDER THE DIRECTION OF THE COURT OF CHANCERY.

said G. H. and I. K., and the said L. M., that the consent in writing of the said L. M. is required for the exercise by the said G. H. and I. K. of their said trust for sale: AND WHEREAS it is represented by the said N. O. and P. Q., that there is now standing in the name of the Accountant-General of the High Court of Chancery, to an account "Ex parte the Corporation of ——," the sum of £——, £—— per Cent. —— Bank Annuities, purchased in pursuance of an act of Parliament passed in the —— year of the reign of his late Majesty King ——, intituled "[*Title of the act*]," and with the money paid in pursuance of the same act for the purchase of two equal third parts devised in strict settlement, by the will, dated the —— day of ——, of Y. Z. deceased, of the —— Lighthouse: AND WHEREAS it is also represented by the said N. O. and P. Q., that, by virtue of the said act of Parliament, the said sum of £——, £—— per Cent. —— Bank Annuities, is subject to be sold, under the direction and with the approbation of the said Court of Chancery, to be signified by an order to be made upon a petition to be preferred in a summary way by the persons who would have been entitled to the annual profits or produce of the said two equal third parts of the said lighthouse, to the intent that the money to be produced by such sale may be applied under the direction and with the approbation of the said Court of Chancery to be signified as aforesaid, in the purchase of houses, buildings, lands, tenements, and hereditaments, to be conveyed and settled to, for, and upon such and the like uses, trusts, intents, and purposes, and in the same manner as the said two equal third parts or shares in the said lighthouse stood settled or limited by the said will of the said Y. Z., or such of them as at the time of making such conveyance and settlement shall be subsisting undetermined, and capable of taking effect: AND WHEREAS the said N. O. and P. Q. claim to be the persons who would have been entitled to the annual profits or produce of the said two equal third parts of the said lighthouse. NOW, they the said A. B. and C. D., so far as relates to the said ten eleventh shares of or to which they claim to be seised or entitled as aforesaid, and the said E. F., G. H., and I. K., so far as relates to the one-eleventh share of or to which they claim to be seised or entitled, as aforesaid, and with the consent of the said L. M., (testified by this writing, under his hand), do hereby agree with the said N. O. and

certain consent being required;

—of a fund being in the Court of Chancery;

—and being subject to be sold, and the produce invested in the purchase of land to be settled;

—of the interest of the purchasers, parties in the fund who are parties to the agreement.

Agreement.

FOR PURCHASE UNDER THE DIRECTION OF THE COURT OF CHANCERY.

P. Q., and the said N. O. and P. Q. do hereby agree with the said A. B., C. D., E. F., G. H., and I. K., in manner following, (that is to say):

For purchase, with the approbation of the Court of Chancery, of property described in a schedule.

THAT, subject to the direction and approbation of the said Court of Chancery, to be obtained as hereinafter mentioned, the said A. B., C. D., E. F., G. H., and I. K. shall sell, and the said N. O. and P. Q., on behalf of the said estate of the said Y. Z., shall purchase ALL THOSE, the manors, messuages, farms, lands, tenements, franchises, and hereditaments, in the schedule hereunder written, or hereunto annexed, particularly mentioned or described, and the timber growing thereon, and with the rights, members, easements, and appurtenances, and the inheritance thereof in fee simple in possession, free from incumbrances, except an annual Crown rent of £—— per annum, payable out of the said premises, and except the liability in the said schedule mentioned of part of the said premises to bear one-half of the expense of the sluice or embankment against the sea AT OR FOR the price or sum of £——, to be paid by and out of the said sum of £—— £—— per Cent. —— Bank Annuities, or the monies to be produced by the sale of a competent part thereof, to the said A. B., C. D., E. F., G. H., and I. K., on the —— day of ——, 18—.

The purchasers to obtain the approbation of the court, and the purchase to be void if it be not obtained, and the purchasers to pay all expenses.

THAT the said N. O. and P. Q., shall forthwith, at their own costs and charges, apply for and endeavour to obtain the approbation of the said Court of Chancery to this present contract, to be signified in manner provided by the said act of Parliament, and that in case such approbation shall not be obtained before the —— day of ——, 18—, this present contract shall be void and of no effect, and the expenses of preparing and executing these presents, and of all other costs and expenses incurred, or to be incurred by the said persons, parties hereto of the first, second, third, and fourth parts respectively, or any of them in respect of the premises, shall be paid and borne by the said N. O. and P. Q.

Agreement as to the delivery of the abstract and the title to be shewn;

THAT the said A. B., C. D., E. F., G. H., and I. K. shall, within —— from the date of these presents, at their own expense, make out, and deliver to the said N. O. and P. Q. or their solicitor, an abstract of the title of them the said A. B., C. D., E. F., G. H., and I. K. to the said manors, messuages, farms, lands, tenements, franchises, and hereditaments, in the said schedule hereunder written, or hereunto annexed, particularly mentioned,

FOR PURCHASE UNDER THE DIRECTION OF THE COURT OF CHANCERY.

and deduce a good title thereto, to them the said A. B., C. D., E. F., G. H., and I. K., subject as hereinbefore is mentioned, except that as to a small part of the —— marsh, numbered —— in the said schedule, and which was acquired by exchange in straightening the boundary, no other title shall be required than the possession of the said vendors, inasmuch as the said exchange was never effectuated by any conveyance or assurance, but simply by the transfer of possession, consequent upon the straightening of the boundary as aforesaid.

—and as to the expense of attested copies, and evidence not in the vendors' possession.

THAT the production and inspection of all deeds, evidences, and muniments of title, which are not in the possession of the vendors, and the expense of all journies incidental to such production or inspection, and the procuring and making of all certificates attested or stamped, office or other copies, or extracts, of or from any registers, deeds, wills, or other documents, and of all declarations, or other evidence as to identity, whether required for the verification of the abstract or for any other purpose, shall be at the expense of the said N. O. and P. Q., or of the said trust fund standing in the name of the said Accountant-general.

If the title fail as to any undivided part, the contract to be wholly void.

THAT in case a good title shall fail to be deduced to any undivided part or share of the said premises, or to any part of the said premises, except as hereinbefore particularly mentioned, this present contract shall be void, as to the entirety of the said premises.

Compensation to be allowed for errors and mistakes.

THAT, inasmuch as the description of the property, in the said schedule to these presents, is taken from a recent survey, it shall be considered and taken to be correct, and if any error or mistake shall appear in the said schedule, the sale shall not thereby be annulled, nor shall any compensation be allowed or given in respect thereof, unless the same shall relate to the amount of rents or incumbrances, in which case, a compensation shall be allowed or given by the vendor or purchaser, as the case may require.

Agreement as to the conveyance;

THAT the said A. B., C. D., E. F., G. H., and I. K. shall, on the said —— day of ——, 18—, or as soon thereafter as a proper order shall have been made by the said Court of Chancery, for the completion of the said purchase, and the payment of the said sum of £——, execute and procure to be executed by all other necessary parties (if any) a proper conveyance and settlement of the said manors, messuages, farms, lands, tenements, franchises, and hereditaments, with their rights, members, easements, and appurtenances, and the fee-simple and inheritance thereof, free from incum-

FOR PURCHASE UNDER THE DIRECTION OF THE COURT OF CHANCERY.

brances, (except as aforesaid), to, for, and upon such uses, trusts, intents, and purposes, and in such manner as the said Court of Chancery shall direct, and that such conveyance and settlement shall be prepared by and at the expense of the said N. O. and P. Q., or of the said trust funds standing in the name of the said Accountant-general as aforesaid.

—as to the day for the completion of the purchase;

THAT the said purchase shall be completed on the said —— day of ——, 18—, and the said N. O. and P. Q. shall on that day be let into the receipt of the rents and profits of the said manors, messuages, farms, lands, tenements, franchises, and hereditaments, and, up to that day, all outgoings payable by the landlord shall be discharged by the said A. B., C. D., E. F., G. H., and I. K.

—the rents and profits, from the day fixed for completion till the actual completion, to belong to the vendors.

THAT if, from any cause whatever, the said purchase shall not be completed on the said —— day of ——, 18—, the said A. B., C. D., E. F., G. H., and I. K. shall not be entitled to interest on the said purchase monies, but shall be entitled to the rents, issues, and profits of the said manors, messuages, farms, lands, tenements, franchises, and hereditaments, until the said purchase shall be completed, in manner following, (that is to say), to the entirety of all rents, issues, and profits which shall have actually accrued due and become payable before the completion of the said purchase, and to a proportionate part, up to the day of completion, of all rents, issues, and profits which shall accrue due and become payable after the completion of the said purchase, such last-mentioned proportionate part to be paid by the said purchasers at the time of the completion of the said purchase. IN WITNESS &c.

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